Supreme Court, U.S.
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No. 93-1270

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In The

Supreme Court of the United States

October Term, 1993

STATE OF CALIFORNIA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

MICHAEL L. PARR et al.,

Real Parties in Interest.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California
FLOYD D. SHIMOMURA
Assistant Attorney General
LINDA A. CABATIC
Supervising Deputy Attorney General
*N. EUGENE HILL
Assistant Attorney General
LARRY G. RASKIN
Deputy Attorney General
1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5166

CHRISTOPHER W. WADDELL
Chief Counsel
Department of Personnel Administration

*Counsel of Record

Attorneys for Petitioner State of California

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2331P

QUESTIONS PRESENTED

1. Is it a violation of the Tenth Amendment and principles of federalism for a federal court to order the State of California ("State" or "Petitioner") to choose between having its good faith defense under the Fair Labor Standards Act stricken and an approximate $300 million judgment by default entered, on the one hand, and disclosure of confidential attorney-client communications, attorney work-product materials, and confidential information which are part of the deliberative decision making process utilized by State officials in the exercise of the State's sovereign powers, to implement the State fiscal policies, including enactment and implementation of a spending plan for the fiscal year?

2. Is it a violation of the Tenth Amendment and principles of federalism for the federal government, though enactment of the Fair Labor Standards Act and implementing regulations, to impose upon the State as an employer a requirement that the State elevate payment of State employees over all other claims on the State fisc when there is inadequate cash in the state General Fund, contrary to the State Constitution, or suffer hundreds of millions of dollars in mandatory penalties if priority to State employees was not satisfied?

PARTIES BELOW

Petitioner (defendant below) is the State of California. Other defendants below are Gray Davis, Controller of the State of California.

Respondents (plaintiffs below) are Michael L. Parr, Michael Guter, Galen McCray, Gary Clark, Benny Rincon, Art Smith, Richard Walsh, Alfonso Cervantes, and Larry Crabtree, together with other unnamed employees of the State of California who have filed consents to participate in the district court litigation pursuant to 29 U.S.C. § 216(b).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of California, prays that a Writ of Certiorari issue to review the decision by the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on November 17, 1993, denying a Petition for Writ of Mandamus requested by Petitioner.

OPINIONS BELOW

The Order of the Ninth Circuit Court of Appeals is reproduced in the Appendix ("App."), p. 1.

JURISDICTION

The order of the Ninth Circuit Court of Appeals denying Petitioner's Petition for Writ of Mandamus was issued on November 17, 1993. This court's jurisdiction is invoked under 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

This case involves the application of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 206, 207, 216(b), 260, Code of Federal Regulations, §§ 531.27, 531.34, and 531.35, and Fed.R.Civ. P. 37(b), in light of the Tenth Amendment, United States Constitution. These provisions are set forth in pertinent part in the Appendix. (App. 52-60.) Jurisdiction of the federal court over this litigation is premised on 29 U.S.C. § 216(b) and 28 U.S.C. § 1337.

STATEMENT OF THE CASE

A. Procedural History

Now that the Ninth Circuit Court of Appeals has denied Petitioner's Petition for Writ of Mandamus, after February 7, 1994, pursuant to Fed.R. Civ. P. 37(b), an order will be issued by the Magistrate Judge striking the State's good faith defense and entering a default judgment, pursuant to a January 6, 1994, Order ("Default Order"), unless the Supreme Court grants this Petition for Writ of Certiorari. (App. 49.)

State employees paid from the General Fund of the State of California brought this action under the FLSA, 29 U.S.C. section 201 et seq., against the State of California and Gray Davis, Controller of the State of California. Plaintiffs allege that the State violated the requirements of the FLSA as to the time and manner of payment of their wages by issuing registered warrants rather than regular warrants from July 1, 1992, through early September, 1992, when the State was without sufficient cash in the General Fund to meet its General Fund obligations. Plaintiffs claim that registered warrants were not cash or its equivalent, negotiable at par, pursuant to regulations promulgated by the Department of Labor. Approximately $300 million in registered warrants were issued to state employees.

The employer has the burden of showing that the violation of the FLSA was in good faith and that the employer had reasonable grounds for believing that its action was in compliance with the FLSA. Absent such a

showing, liquidated damages are mandatory. *Bratt* v. *County of Los Angeles*, 912 F.2d 1066, 1071 (9th Cir. 1990).

Plaintiffs filed a Motion for Partial Summary Judgment, and the District Court held on December 3, 1992, that the use of registered warr nts to pay the wages of State employees violated the Act. (App. 2.) The next phase of the case was to focus on "[w]hether the State acted in bad faith and without reasonable grounds for its belief that issuance of registered warrants complied with the FLSA's manner of payment requirement." (March 3, 1993 Consolidation Order, App. 23.)

Plaintiffs propounded discovery to review the State's budgetary and fiscal decisions, including decisions from the prior fiscal year before registered warrants were issued. The State objected on the grounds that the discovery unnecessarily invaded the deliberative process, the attorney-client and attorney work-product privileges, and was not related to the State's good faith defense. In an attempt to avoid unnecessary battles over privileges that were not part of the State's good faith defense, the State detailed its good faith defense in a March 31, 1993 letter to Plaintiffs. (App. 154.)

The State pledged to limit itself to the outline of its case and offered to partially waive relevant portions of the attorney-client and attorney work-product privilege and allow Plaintiffs to depose the Chief Counsel of Department of Personnel Administration ("DPA") and the Chief Counsel of the Controller's Office – the officials with responsibility to evaluate the issue whether the issuance of registered warrants to State employees violated the FLSA – as well as other specific individuals from the

Department of Finance ("DOF"). Either the State's good faith defense was going to be sufficient to meet the good faith test, as ultimately determined by the District Court, or the State would suffer the consequences, since the burden was on the State to prove its good faith under the FLSA.

The Magistrate issued an Order concerning the discovery dispute on June 18, 1993 ("Disclosure Order"), in which he held that the attorney-client and attorney work-product privileges had been waived and/or the State impliedly consented to disclose such information by asserting the good faith defense. (App. 28.) The Magistrate ordered the State to either disclose to Plaintiffs all of the advice provided to it by counsel and *all* of its attorneys' work-product materials concerning not only the FLSA, but *other* budgetary/fiscal matters, encompassing the period even after litigation had been initiated by Plaintiffs, and from the fiscal year *prior* to the fiscal year in which registered warrants were issued, or *withdraw* its good faith defense. The Magistrate also refused to limit further inquiry into various budgetary/fiscal matters involving the deliberative process privilege. Copies of the discovery requests at issue, Interrogatory Nos. 1-30, the First Request for Production of Documents, the Second Request for Production of Documents, and the pertinent section of the Deposition of Lafenus Stancell are reproduced in the Appendix. (App. 80-153.)

On September 29, 1993, the District Court held that the Disclosure Order was not clearly erroneous or contrary to law and adopted and affirmed the Disclosure

Order.[1] (App. 48.) Petitioner then filed a Petition for Writ of Mandamus with the Ninth Circuit Court of Appeals, requesting the Court of Appeals to order the District Court to vacate its September 29, 1993 Order. On November 17, 1993, the Ninth Circuit Court of Appeals rejected Petitioner's Petition for Writ of Mandamus.

B. Factual Background

1. General Overview of The California Fiscal Process

Through an initiative approved by the voters of the State in 1922, section 12 of Article IV of the California Constitution requires a general spending plan for all revenues and expenditures. (App. 62.) The annual budget process is the method institutionalized by the citizens of the state for the purpose of providing a *comprehensive* approach to state appropriations, to vest in the Governor the power to propose a state budget and to prohibit other non-emergency appropriations until the budget is enacted. (Cal. Const., *supra*, Art. IV, §§ 12, subdvs. (a), (c), and (d).) Through the general spending plan established by the citizens of the State in the California Constitution, varied interests competing for spending priorities are balanced through the political process to enact the State's budget. Enactment of a budget is the ultimate act of sovereignty: the State decides the amount of tax to

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[1] Although this Petition is directed to the Order of the Ninth Circuit Court of Appeals, all references will be to the Disclosure Order and/or the Default Order, unless otherwise noted.

impose upon its citizens and the priorities to give those collected funds in determining how the money is spent.

Before an expenditure can be made, two requirements, under California law, must be met:

1) there must be an appropriation which authorizes the expenditure, since without an appropriation authorizing an expenditure, state officers simply lack authority to expend funds for a specific purpose; and

2) there must be a source of funds available from which to make the payment. (Cal. Const., Art. XVI, § 7; Gov. Code, § 12440; App. 69, 74.)[2]

The Registered Warrant process provides a comprehensive approach to payment of competing obligations.

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[2] Where there is insufficient cash in the treasury, a warrant drawn by the Controller can not be paid by the State Treasurer, even though there may be an appropriation permitting the warrant to be drawn by the State Controller. (Gov. Code, § 17200 et seq.; App. 78.) When the warrant cannot be paid because of the lack of cash in the State General Fund, state law requires that the warrant be registered, specially endorsed to that effect by the State Treasurer, and transferred to the payor. This situation confronted the State in July and August, 1992. Registered warrants are paid by the Treasurer from the State Treasury in the order of registration, when the State Controller finds that sufficient cash has accumulated in the general fund to permit payment.

Since the registered warrant is defined by State law in Government Code section 17205 as a negotiable instrument, the payor may, as with non-registered warrants, utilize the commercial marketplace to effect payment. (App. 77.) Most registered warrants in this case were presented to the State Treasurer for payment from the Treasury by commercial purchasers from the original payee.

The Registered Warrant procedure recognized the policy judgments of the people, as expressed in the California Constitution, and establishes priority for allocating the cash as it accrues in the General Fund in accordance with the date the warrant is registered. *Riley* v. *Johnson*, 219 Cal. 513, 521-522 (1933).[3]

2. The Issuance of Registered Warrants During the Summer of 1992

As the fiscal year began on July 1, 1992, there was not enough cash in the General Fund to pay all obligations of the State.[4] In addition, the State began the fiscal year

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[3] The California Supreme Court had previously upheld the use and legality of registered warrants under California law during the Depression, the one-time in California history registered warrants were issued by the State.

The priority given the holder of a registered warrant for payment from cash in the General Fund depends upon the date the warrant is registered. Under State law, registered warrants issued to State employees are not given a priority claim on cash in the State treasury over other persons issued registered warrants for other State obligations. Nor are they given a special claim on the General Fund, such as that given to support of State schools or payment of principal and interest on general obligation bonds.

[4] Care must be taken to distinguish between the lack of an appropriation, and the lack of cash available even if there is an appropriation authorizing payment. State law guarantees payment to state employees who work during the interim where the state lacks appropriations for payment. Under state law, that payment will occur as soon as the spending plan is enacted. An appropriation from the General Fund for payment of state employee salaries was enacted in advance of and separate from the state budget, after the 1992/93 fiscal year began. While that appropriation authorized the issuance of warrants, it did not cure the lack of cash.

without enactment of state budget. The spending authority of the State authorized by the budget for the prior fiscal year expired on June 30, 1992.[5] State law then required the Controller to issue Registered Warrants for all other payments of General Fund obligations, effective July 1, 1992, for which there was an appropriation,[6] a

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[5] Furthermore, as of June 30, 1992, the Controller determined that there would be inadequate money in the General Fund to pay all of the State's obligations, and all cash in the General Fund had to be reserved and not paid out in order to have enough money to pay priority claims required by the State Constitution, such as support of the public school system and public institutions of higher education; payments for principal and interest on state bonded indebtedness; repayment to special funds as required for funds borrowed (Cal. Const., art. XVI, § 8; App. 70); payment of principal and interest on state bonds (Cal. Const., art. XVI, §§ 1, 1.5, 2; App. 64-68); repayment of loans to special funds, as required by state law (Gov. Code, § 16310; App. 75); *and* to redeem, on July 24, the $475 million in external borrowing through a Registered Reimbursement Warrant, or Revenue Anticipation Warrant ("RAW"), issued in the Spring of 1992, which was one of the conditions for the issuance of the RAW. (App. 181.)

[6] Compensation to all state employees for services rendered after July 1, 1992, pursuant to Statutes 1992, chapter 205 ("SB 220") was one of the payments for which an appropriation existed, even without a budget, as of July *10*, 1992. Section 2, chapter 205, Statutes 1992, provides:

> "There is hereby appropriated from the General Fund and any appropriate special fund to the Controller, and the Controller is authorized to expend, an amount no greater than that necessary to enable the Controller to compensate state employees for services rendered by those employees during the period from July 1, 1992, until the date the Budget Act of 1992 is enacted."

That act constituted the authority of the State as employer to issue warrants to compensate employees for their services.

continuing appropriation, or a court order requiring payment.

The controlling State law, in constitution and statute, dealing with the fiscal operations of government in circumstances where the State lacks cash in its treasury to honor all of its obligations, represents policy judgments derived directly by the citizens of the State and through their representatives to permit government to continue to function in its sovereign capacity, until the cash deficit is eliminated. It is designed to balance the various needs of the people who rely upon the sovereign for public safety and entitlements provided by law as well as those who deal with the sovereign in other capacities, such as the capacity of employer, or ordinary creditor. Through the

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The Budget Act is usually the appropriation document, although it can be elsewhere, e.g. "SB 220." In light of the District Court decision then in effect in *Biggs* v. *Wilson*, United States District Court, Eastern District, Case No. CIVS-90-0942 WBS/CCH, issued October 3, 1991, (the "*Biggs* case"), 1 F.3d 1537 (9th Cir. 1993) cert. denied 93-772, an FLSA case requiring "prompt payment" to state employees when no budget was in effect authorizing any expenditure, the Legislature made a specific non-budget act appropriation (SB 220) on an emergency basis for the payment of compensation to state employees from July 1, 1992, until the budget act was enacted, in order to comply with the requirement in *Biggs* to pay certain state employees even if no budget (and appropriation) was in effect. Without this measure, there would have been no authorization to pay state employees during the period in which no budget was in place in the summer of 1992. SB 220 still did not cure the problem of the lack of cash available, even though it provided for an appropriation. (See fn. 4.)

constitution and statutes enacted by their elected representatives, exercising delegated plenary power, the citizens of the State have instructed elected and appointed state officials how to act for the public benefit under such circumstances.

3. State's Good Faith Defense

In January, 1992, the State began to face an unprecedented cash-flow crisis in the General Fund.[7] In addition,

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[7] According to the Legislative Analyst,

"the estimated budget funding gap grew from $6 billion at the time of the Governor's January [1992] budget proposal to $11.2 billion by the time of the administration's May [1992] revision of its spending and revenue estimates. Essentially all of the $5.2 billion increase in the size of the gap was caused by downward revisions of the administration's estimates of 1991-92 and 1992-93 revenues.

"Thus, by May 1992, the Legislature and the administration faced a budget funding gap equivalent to almost one-fourth of the state's General Fund baseline budget. Although the 1992-93 funding gap was somewhat smaller than that in 1991-92, the following factors made it even harder to resolve:

"Given the significant tax increases enacted to close the 1991-92 funding gap and the ongoing recession, there was general agreement between the Governor and the legislative leadership that tax increases would not be used to close the 1992-93 funding gap.

"Uncertainty over the timing and strength of economic recovery made it difficult to gauge the extent to which the use of one-time solutions could be justified, because they depend on a future rebound in revenues.

the State budget was not enacted by the start of the new fiscal year, beginning on July 1, 1992. Although the Legislature routinely missed the constitutional deadline (June 15) and sometimes missed the fiscal year deadline (June 30), only once before in the 70-odd year history of California's executive proposed budgets had the budget been late enough to actually affect the payment of state employee's regular salary. During the spring of 1992, there was no reason to anticipate that the budget would not be timely passed or, if enacted "late," that it would be late enough to affect the payroll.[8]

While the FLSA requires payment to employees of cash or its equivalent, negotiable at par, the statute, the regulations and case law do not specifically define the meaning of the terms "cash or its equivalent," "negotiable at par" or when exactly payment is due. (App. 55-57.) After the State began the new fiscal year without a budget enacted, the Controller's legal counsel and the DPA's Chief Counsel – the State's attorneys with responsibility

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"Spending reductions in 1992-93 would come on top of $3.4 billion in spending reductions that were used to close the 1991-92 budget funding gap."
State Spending Plan for 1992-93, Legislative Analyst's Office, November 1992, pg. 5.

Options for dealing with the cash flow crisis were extremely limited, since the State had exhausted its ability to borrow internally. Furthermore, article XVI, section 1 of the California Constitution prohibits the State from engaging in deficit spending except in certain narrowly defined circumstances. (App. 64.)

[8] Passage of a budget would have solved the State's cash problem by permitting additional external borrowing not otherwise permitted unless a budget was in place. (Gov. Code, § 17300; App. 79.)

over FLSA – both authored separate legal analysis in light of the *Biggs* case, *supra*, footnote 6, and concluded that there was nothing in federal law which prohibited payment to state employees with registered warrants, and no authority which on its face found California's constitutionally and/or statutory mandated priorities of payment by the State to be unlawful. The State's action did not deviate from that legal advice, once it became necessary to issue registered warrants for those items which were not granted priorities under California law. The State, in the exercise of its sovereign powers over its public fisc, simply followed California law, as required by Article III, § 3.5 of the California Constitution when no *appellate* court case existed which had made a determination that the State statutes were unconstitutional.[9] (App. 61.)

REASONS FOR GRANTING REVIEW

This case is not merely a "discovery dispute" which can be resolved after judgment is ultimately entered. At issue here is the vulnerability of the State's decisionmaking process at the highest levels, through intrusion by abnegation of the rules of privilege under the FLSA. This

[9] The State then took specific steps to ensure the negotiability of registered warrants in the commercial marketplace and acceptance by federal agencies responsible for regulating the banking and financial community, which resulted in almost universal acceptance of employees' registered warrants by a majority of the banking and financial community, except a few isolated instances.

intrusion is impermissible under the Tenth Amendment.[10] Federalism is premised on the idea that states have legitimate interests which the national government is bound to respect, though its laws are supreme.

Through the unrestricted application of the FLSA under the Commerce Clause to the states, the State now faces the striking of its good faith defense on February 4, 1994, and the imposition of liquidated damages of approximately $300 million. Even if the State agrees to the discovery as ordered and such materials are found inadmissible at trial, the damage to the State will have already occurred in this FLSA litigation – the unnecessary intrusion into the State's sensitive privileges in matters which go to the essence of the process how the State defines its most fundamental aspects of decision making authority. This invasion into the deliberative process of a state in formulating a budget will impact every state in the nation, since every state in the country engages in a similar political process to develop a budget and to determine how to allocate limited resources among competing interests.

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[10] There is a related case before this Court on Petition for Writ of Certiorari, *New York State* v. *Reich*, 3 F.3d 581 (2d Cir. 1993), No. 93-797. The *Reich* Petition involves the effect of the application of the FLSA on *New York State*'s sovereign function and its ability to deploy and operate the criminal investigative unit of its state police in the manner that state deems most effective and efficient to fight crime and keep the peace.

I

SOME LIMITS ON THE APPLICATION OF THE FLSA TO THE STATES ARE NECESSARY IF THE TENTH AMENDMENT IS TO HAVE ANY MEANING

In *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 544 (1985), this Court reversed its earlier decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and held that application of the overtime and minimum wage requirements of the FLSA to the States did not exceed the limits of the federal government's power to interfere with state functions. *Garcia* v. *San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at 554-557. In doing so, this Court departed from a test for determining immunity from federal regulation that was based largely upon whether the federal statute "impaired [the state's] ability to structure integral operations in areas of traditional governmental functions." *Garcia* v. *San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at 531, 537. In essence, this Court decided in *Garcia* that the states' sovereignty was not unconstitutionally infringed upon by treating the states' functional operations as any other employers' enterprise would be treated for purposes of minimum wage and overtime laws. *Id.* at 554.

Unlike the governmental activity under review in *Garcia*, here the process by which the State formulates its budget and controls expenditures is not only inherently political in nature, but is reflective of a decision making process and a comprehensive establishment of priorities of payment established by the citizens through amendments to the State Constitution and statutes subsequently enacted by the citizens' representatives.

While *Garcia* did away with focusing on whether the federal statute impaired the state's ability to structure integral operations in areas of "traditional governmental functions," this Court in *Gregory* v. *Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395 (1991) held that a state's *political functions* were *still* protected by the 10th Amendment, even in the aftermath of *Garcia*. In *Gregory*, this Court examined the application of the Age Discrimination in Employment Act (ADEA) to a state constitutional provision that provided for mandatory retirement of judges at age 70. In discussing the application of the ADEA to the mandatory retirement provision, the Court noted that:

> "This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. *Through the structure of its government*, and the character of those who exercise government authority, a State defines itself as sovereign." (*Gregory* v. *Ashcroft*, *supra*, ___ U.S. ___, [111 S.Ct. at p. 2400], emphasis added).

This Court, in *Gregory*, cited with favor a passage from *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), which recognized the " . . . State's constitutional responsibility for the establishment and operation of its own government," and acknowledged the unique nature of state decisions that "go to the heart of representative government." *Gregory* v. *Ashcroft*, *supra*, ___ U.S. ___, [111 S.Ct. at 2401].

New York v. *United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992) reiterates that *Garcia* was not meant to be an abrogation of the political functioning of a state. In *New York*, this Court invalidated a provision in the Low Level Waste

Policy Act (42 U.S.C. §§ 2016-2021), which "impermissibly directed the States to regulate in this field." *New York* v. *United States, supra,* at 2420. In reaching this conclusion, this Court declared that:

> "Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the states to enact or administer a federal regulation program." *Id.* at 2435.

In *New York,* the state was faced with:

> " . . . a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." *Id.* at 2408.

How California and states throughout the nation organize and prioritize which interests are to be paid first, conditioned on an overall spending plan enacted through the budget, is nothing less than the most fundamental decision by which a state defines itself, and which "go[es] to the heart of representative government," originally referred to in *Sugarman* and reaffirmed by this Court again in *Gregory, supra.* The ability of states to carry out their fiscal responsibility to provide a comprehensive approach to state appropriations in accordance with the mandate of their citizenry is one of the principal legitimate interests of the states envisioned under federalism. *Duncan* v. *McCall,* 139 U.S. 449 (1891). The error of the Ninth Circuit Court of Appeals and the District Court is in ignoring the teachings of this Court from those cases, and failing to apply those principles in the context of this case, simply because the FLSA applies now "carte blanche" to the states. This failure to apply the principles enunciated in *Sugarman, Gregory,* and *New York, supra,* to

situations where the FLSA is applied, upsets the constitutional balance of federal and state powers.

In practice, *Garcia* has opened the door to an almost unlimited application of federal regulation of the states under the Commerce Clause – no matter what the ultimate effect on a state's sovereignty – to the complete exclusion of federalism under the Tenth Amendment as defined by *Gregory* v. *Ashcroft* and *New York* v. *United States, supra*. The case before the Court now illustrates the extent of the ruling in *Garcia*. Not only are California's spending priorities completely set aside, but, through discovery under the FLSA, parties can now intrude into the State's deliberative process which occurred during the budget process, at the highest levels of government, from one or more fiscal years, regardless of the effect on the State's sovereign functions, and obliterating privileges California has deemed are essential to its governmental process.[11] This is not solely a "California" problem, but one which now impacts every state in the nation that must engage in the delicate and vital process of developing a budget in its capacity as a sovereign state.

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[11] It is hard to believe that the Congress, in enacting the FLSA, intended that state employees should have a priority over all other creditors of a state, including general obligation bond holders. As interpreted by the District Court, Congress, through the enactment of a statute concerning employee relations under the Commerce Clause, has re-ordered the State's spending priorities, through the one provision at issue. The states may as well delegate their budgetary functions to Congress.

As shown by the Declaration of the Governor's Chief of Staff and the Governor's Legal Affairs Secretary previously submitted to the lower courts, (App. 169), the FLSA's intrusive effect in California's representative form of government as expressed through the State's Constitutional and statutory comprehensive budget process will continue to permeate and direct the State fiscal and budgetary process, unless limits on the application of the FLSA to the states to protect the State's representative form of government are established, under the principles enunciated in *Gregory* v. *Ashcroft* and *New York* v. *United States, supra.* This is not an academic matter. With a new budgetary decision making cycle beginning again, "discovery" through FLSA litigation can continue to be used as a vehicle to invade – and impair – the decision making process now going on.

Justice O'Connor noted in the dissent to *Garcia* v. *San Antonio Metropolitan Transit Authority, supra,* 469 U.S. at p. 580, that:

> " . . . the true 'essence' of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme. (Citing *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).) If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."

The application of the FLSA in this case, and the invasive discovery which then "flows" from the application of the FLSA, abrogates California's sovereign ability

to assure its state expenditures and employee payrolls are authorized in accordance with State law, and disallows the comprehensive, organized framework for the comprehensive approach to State appropriations through the budget California has enacted in both its Constitution and statutes.[12] Even without abandoning *Garcia*, the Court can ensure that states' legitimate sovereign interests are preserved by applying the principles enunciated in *Gregory* v. *Ashcroft* and *New York* v. *United States* to place limits on *Garcia*, and to ensure that the application of the FLSA to the states is consistent with the principles enunciated by this Court subsequent to *Garcia*.

Unless this Petition is granted, federalism in this case will be expressed as a striking of the State's good faith defense and an entry of a default judgment against the State, with approximately $300 million in liquidated damages automatically being awarded to State employees, and other states can expect similar challenges under other

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[12] The State's role as an employer is a small component of its broader role as a sovereign state. Payroll is a relatively minor part of the State's $54 billion dollar total State expenditures for 1992/93, amounting to approximately 5% of the State's expenditures. The elected officials of the State are required to make policy determinations and establish priorities for the allocation of scarce resources among hundreds of competing interests. The elected officials of the State must likewise balance the burdens and benefits of increased borrowing or higher levels of taxation for all the State's citizens and be concerned about the long term as well as the short run. Furthermore, the fiscal integrity of the State depends on its ability to raise cash in the commercial market place to carry out those activities necessary and essential to its capacity as one of the sovereign states of the United States of America and to further its responsibility to the people of the State who create and foster it as a sovereign state.

Commerce Clause based federal litigation which were not envisioned by Congress to have such an invasive and far-reaching effect.

II

UNRESTRICTED APPLICATION OF THE FLSA TO THE STATES DEPRIVES THE STATES OF THE PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK-PRODUCT PRIVILEGE AND THE DELIBERATIVE PROCESS PRIVILEGE

The Disclosure Order is premised upon an overbroad identification of the subject matter encompassed by the FLSA, flowing from the unrestricted application of the FLSA to the states under the Commerce Clause.

The Disclosure Order also finds a waiver of all attorney advice received by the State and attorney work-product concerning *multiple subjects* encompassed in the discovery requested – from the RAW to SB 220 and other fiscal and budgetary matters, beyond even the fiscal year that registered warrants were issued.[13] Even the work

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[13] The result is that the cash management problems occurring in the Spring of 1992, of the 1991/92 fiscal year, which ended June 30, 1992, concerning cash management decisions to get the State through *that* fiscal year, months before registered warrants were issued in the *next* fiscal year, results in an unlimited search by Plaintiffs through the governmental decision making process, at the highest levels of the State – from the Governor's highest level policy and legal advisors *and* from the Governor himself, for a period covering budgetary and fiscal decisions occurring *months before registered warrants were issued.* This drastic result will occur despite the fact that the Plaintiffs already know what the State's position was *and* what the State

prepared by the State's legal counsel *after* the lawsuit was filed by Plaintiffs, and in direct response to the litigation, must be produced. Through the unrestricted application of the FLSA to the states, the Disclosure and Default Orders require *complete* obliteration of the attorney-client privilege, and allow unlimited access by Plaintiffs to the work product and communications of the State's attorneys, on matters going well beyond the question of whether the issuance of registered warrants violated the FLSA, under the sanction of the ultimate penalty: giving up the good faith defense and being automatically subject to hundreds of millions of dollars in liquidated damages.

Plaintiffs speculate that other "options" and/or "better options" existed rather than issuing registered warrants – and hence now want an opportunity to focus in this FLSA litigation on other "budgetary actions" taken or not taken even *months before registered warrants were issued*, and to explore, in retrospect, other budgetary/fiscal options not selected by the State. If allowed, Plaintiffs will invade the essence of the primary governmental process.[14] Surely the

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did, through a comprehensive public record, and through Plaintiffs' access to the research the States' attorneys conducted concerning the FLSA, the cases reviewed, and the basis for their respective conclusions that registered warrants were not a violation of the FLSA. Since the issuance of registered warrants is "self-executing" under California law and required pursuant to statute once certain conditions exist, Plaintiffs' continued inquiry into decisions occurring in the *prior* fiscal year is simply not relevant.

[14] If the external borrowing which occurred in the Spring of 1992 for the 1991/92 fiscal year is relevant to the good faith issue which is the subject of the litigation, then conceivably *every decision* which preceded the issuance of registered

application of the FLSA to the states was not intended to countenance such an unwarranted invasion into the states' democratic process.

If the FLSA good faith defense requires such unwarranted intrusiveness into the State's governmental process, then it is utterly incompatible with any notion of state independence, sovereignty and federalism under *Gregory* v. *Ashcroft* and *New York* v. *United States, supra.*

A. The FLSA's Impact On The Deliberative Process

As explained in the Declaration of the Governor's Chief-of-Staff, the process of budget building is dialectical. (App. 169.) Participants in this process suggest changes and raise questions that need to be resolved in order to formulate the budget policy and set priorities for the expenditure of limited funds while developing the comprehensive budget mandated by the State Constitution.

To require disclosure of policy makers and advisors' advice or input – or even the identity of every person consulted – in litigation after decisions have been made, would inevitably result in a disruption of the governmental process and the free flow of ideas, opinions, advice, and candid discussions within departments and between departments, the DOF, and the Governor's Office concerning priorities and programs for the use of

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warrants which either took cash out of the General Fund *or* did not add cash to the General Fund, is a "relevant" issue for discovery in FLSA litigation against the State.

scarce funds, affecting the final quality of the ultimate decisions.

The broad scope of the Disclosure Order seems to be driven by the Magistrate's dislike of "secrecy" in an open, democratic system. But the need for private reflection in the conduct of the public's business is a reality the deliberative privilege specifically acknowledges and accepts as an integral part of the democratic process. As this Court has noted:

> "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with concern for appearances . . . to the detriment of the decisionmaking process."

United States v. *Nixon*, 418 U.S. 683, 705 (1974). Similarly, the California Supreme Court concluded:

> "Access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence, are essential to effective governance in a representative democracy."

Times Mirror v. *Superior Court*, 53 Cal.3d 1325, 1347 (1991).

The unrestricted application of the FLSA to the states under the Commerce Clause, results here in discovery which subjects the State to a review of *every* budgetary/fiscal option considered *or* not considered, at the highest level of government, including the Governor himself, over matters which are the essence of state governing and

sovereignty.[15] In light of the ever present threat of litigation attempting to link liability to particular budgetary

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[15] The considerations that went into deciding how much the State should borrow externally and when its borrowings were to be repaid, are matters of public record. The Governor's authorization for the RAW makes clear that the approval for the RAW was predicated upon obtaining sufficient funds to operate through the end of *that* fiscal year, rather than presuppose that a budget would not be passed timely and take action that would ameliorate any of the many contingencies that would result therefrom. (App. 177.) This is exactly the type of governmental decision making encompassed under the deliberative process privilege which goes to the basis of how to operate the State, in its capacity as a sovereign, especially when there is not enough cash available in the General Fund to meet all state obligations.

Similarly, the Governor's Letter to the Legislature states as a matter of public record the reason SB 220 was enacted as an emergency measure and signed by the Governor on an urgency basis. SB 220, was enacted on July 14, 1992, and provides an authorization to pay State employees. (App. 184.) The emergency appropriation bill (SB 220) was passed on July 14, 1992, in anticipation of the lack of a budget by July 31st. SB 220 does *not* address whether registered warrants issued to State employees complied with the FLSA, as cash or cash equivalents, and was not enacted to deal with that concern. SB 220 simply does not address the FLSA aspect of *this* litigation but the *prompt payment* requirement of the FLSA, under the situation when there was no authorization to expend funds when no budget was enacted, as addressed by the *Biggs* case. *Biggs* was an *appropriation question*, and SB 220 specifically addressed *that* issue and that aspect of the FLSA concerning "prompt payment."

This is another example where the public record and public documents exist which not only state the action taken by the State, but also explain the reasons for the actions. In light of the breadth of the public record, the highly public legislative budget process and the public debate surrounding SB 220, Plaintiffs cannot seriously argue that they cannot present a clear picture of what transpired based on the easily accessible information.

and fiscal policy choices by every "aggrieved budget loser," all internal debate will effectively be stifled or curtailed, severely affecting the quality of the decisions made, which is exactly the result the established case law meant to prevent. The right of Plaintiffs to "review" through discovery every budgetary and fiscal decision by the State through the unrestricted application of the FLSA to the states creates the intrusive invasion to states' deliberative process in the exercise of their sovereign functions, notwithstanding the "protection" of the Tenth Amendment. This is a perfect example why the application of the FLSA under these circumstances violates the 10th Amendment. If, in retrospect, the State is required to "go back" to the Spring of 1992 and change a political decision and restructure completely how the governmental decision making process operates because of a federal statute unrelated to the governmental process, then even under *Garcia* v. *San Antonio Metropolitan Transit Authority, supra,* 469 U.S. 528, 1055. Ct. 1005, this violates the 10th Amendment.[16]

Plaintiffs should not therefore be allowed to trample upon governmental privileges relating to this subject, including, rifling through the Governor's Office, as requested in Document Request No. 13. (App. 117.)

[16] How far back are basic governmental operations to be "restructured", to deal with the FLSA? Is invalidation required of constitutional measures enacted by the people, such as Proposition 13 enacted in 1979, limiting tax revenue, Proposition 98, enacted in 1988, requiring specified State support for public education, etc., since they conceivably impact a federal employment statute which the State was not aware was to have such a far-reaching effect, in order to avoid state liability under the FLSA? Can Plaintiffs inquire as to why such options – or any

Plaintiffs also seek to know the identities of those involved in various budgetary and fiscal decisions and in the drafting and consideration of SB 220, as well as to obtain the Governor's calendars themselves, on the premise that they are merely seeking "facts" which are outside the deliberative process privilege. (App. 128.) The California Supreme Court has held that the identity of the Governor's advisors and the subject matter of the discussions is not a matter which is simply "factual," but is the "functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes." *Times Mirror Co.* v. *Superior Court, supra,* 53 Cal.3d at 1343.

Times Mirror Co. v. *Superior Court, supra,* involved a request to obtain the disclosure of the Governor's appointment schedules and calendars under the Public Records Act (§ 6250 et seq.).

The California Supreme Court held that:

> "If the law required disclosure of a private meeting between the Governor and a politically unpopular or controversial group, that meeting might never occur. Compelled disclosure could thus devalue or eliminate altogether a particular viewpoint from the Governor's consideration. Even routine meetings between the Governor and other lawmakers, lobbyists or citizens' groups might be inhibited if the meetings were

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other options, ranging from increasing revenues through taxes to cutting expenditures – were not considered, and the State *lack* bad faith under the FLSA by not doing so? Surely these are not the intended consequences of the FLSA.

> regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press. In sum, while the raw material in the Governor's appointment calendars and schedules is factual, its essence is deliberative. Accordingly, we are persuaded that the public interest in withholding disclosure of the Governor's appointment calendars and schedules is considerable." (*Id.*, p. 1344.)[17]

This is yet another example of the invasive effect of the unrestricted application of the FLSA to the states. Here, how the State defines its deliberative process privilege concerning the operation of its internal government decision making process is completely set aside. The result is that whether the State's high office holders have a broad deliberative process privilege in budget litigation or a narrow one will depend on whether a lawsuit can be characterized as one encompassed under the FLSA.

B. The Obliteration Of The Attorney-Client Privilege And The Demise Of The Attorney Work-Product Privilege

Once Plaintiffs were permitted access to the counsel who actually provided the advice concerning the legal

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[17] See also, *Rogers* v. *Superior Court of Los Angeles County*, ___ Cal.App.___, D.A.R. 13013, 13015, October 15, 1993. "[D]isclosure of records of telephone calls made and received by public officials sought will disclose the identity of persons with whom the government official has consulted, thereby disclosing the official's mental processes. In both cases, routine public disclosure of such records would interfere with the flow of information to the government official and intrude on the deliberative process.")

proposition that issuance of registered warrants to state employees did *not* violate the FLSA, and the facts disclose that counsel did not indicate the issue as problematic, it is unclear why Plaintiffs should then be entitled to increasingly more and greater access to all the State's attorneys, even as to that one limited FLSA issue. This Court has already recognized the value and public benefit of the "full and frank communication between attorneys and their clients." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). To allow additional unwarranted and unlimited access to any and all attorneys under the guise of "discovery" is an impermissible intrusion into the State's function as a sovereign, including its ability to consult with its attorneys on matters involving the budgetary and fiscal operations of the State. (App. 193.)

In addition, once litigation was instituted by Plaintiffs, the State's counsel went into a "litigation mode," and much of their mental processes and work-product became responsive to the litigation. To now require the State's counsel to just open their files and "minds" to the Plaintiffs concerning this FLSA litigation is the functional equivalent of creating an "in house" satellite office of Plaintiffs' counsel's law firm, within the State, resulting in the demise of the attorney work-product privilege. This result surely was not envisioned by this Court in *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947), in which this Court held that the mental impressions, conclusion, opinions and legal theories concerning a lawsuit are outside the scope of discovery. The court in *Hickman* specifically intended to prevent adversaries from "borrowing the wits of their adversaries" by obtaining access

to opposing counsels' work-product, as Plaintiffs now seek to do.

Plaintiffs seek to obtain access to highly placed government officials to essentially challenge their credibility – or as the plaintiff in *Hickman*, to ensure that they have not "overlooked" anything. This type of unwarranted fishing expedition is also what *Hickman* intended to prevent. Access to the State's primary counsel and their work-product concerning the subject matter as defined by the Consolidation Order, i.e., whether the issuance of registered warrants to employees violated the FLSA, is a different question and a different subject matter than what occurred later in time: how to defend the lawsuit filed by Plaintiffs.

To grant Plaintiffs unrestricted access to *all* the State's attorney work-product as sought in the discovery is to blatantly violate the rule in *Hickman* prohibiting mine-sweeping an adversary's mind. It gives the Plaintiffs an inappropriate windfall to the detriment of the State.[18]

CONCLUSION

The State's decisions, the justification for those decisions, and the actions taken to ensure that employees

[18] None of the cases cited by the Magistrate involved either the FLSA *or* governmental entities acting in the unique capacity as the sovereign, but only cases involving companies operating for profit where the concerns to be reconciled were much more limited than a sovereign balancing the varied competing interests in the fundamental operations of government, within the legal restrictions known to the State.

would be able to cash the registered warrants are clearly a matter of the public record. Delving beyond that record under the auspices of the unrestricted application of the FLSA through the Commerce Clause, into the analyses, discussions and recommendations that resulted in the budgetary and fiscal decisions, would be an unwarranted intrusion into the mental processes of the decision makers regarding complex determinations that represents the essence of sovereignty. Such an unwarranted intrusion into the sovereign powers of the State violates the concept of federalism under the Tenth Amendment and violates the principles enunciated in *Gregory* v. *Ashcroft* and *New York* v. *United States*, impacting every state in the nation. This Court should therefore grant the State's Petition for Writ of Certiorari.

DATED: Feburary 2, 1994.

DANIEL E. LUNGREN
Attorney General of the
State of California
FLOYD D. SHIMOMURA
Assistant Attorney
General
LINDA A. CABATIC
Supervising Deputy
Attorney General
LARRY G. RASKIN
Deputy Attorney
General

*N. EUGENE HILL
Assistant Attorney
General
1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5166

CHRISTOPHER W. WADDELL
Chief Counsel
Department of Personnel
Administration

*Counsel of Record

Attorneys for Petitioner
State of California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, Respondent, and MICHAEL L. PARR, et al., Real Parties in Interest.	No. 93-70894 DC# CV-S-91-01115-GEB Eastern California (Sacramento) ORDER (Filed Nov. 17, 1993)

Before: SCHROEDER, KOZINSKI and THOMPSON, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). The motion for a stay of the district court's September 29, 1993 discovery order is denied as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, MICHAEL GUTER, GALEN McCRAY, GARY CLARK, BENNY RINCON, ART SMITH, RICHARD WALSH, ALFONSO CERVANTES, and LARRY CRABTREE, individually and on behalf of other persons similarly situated, Plaintiffs, v. STATE OF CALIFORNIA; GRAY DAVIS, CONTROLLER OF THE STATE OF CALIFORNIA, Defendants.	CIV-S-92-1115-GEB-PAN ORDER (Filed Dec. 2, 1992)

I. INTRODUCTION

Plaintiffs are State employees who allege defendants violated the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201-19, by paying plaintiffs' wages with registered warrants.[1] Plaintiffs allege the FLSA and its

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[1] Plaintiffs sue individually and on behalf of other persons similarly situated, pursuant to 29 U.S.C. § 216(b). Section 216(b) provides that an employee may sue an employer who violates 29 U.S.C. § 206 or § 207 on the employee's own behalf and on behalf of other employees similarly situated. However, "[n]o employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). As of September 4, 1992, 86 employees had filed

enabling regulations require employers to pay employees (1) in cash or its equivalent and (2) promptly. Plaintiffs seek partial summary judgment, claiming defendants violated 29 U.S.C. §§ 206 and 207 by failing to pay plaintiffs' wages promptly in cash or its equivalent.[2] Defendants argue that requiring them to pay their employees promptly in cash or its equivalent would violate the Tenth Amendment, and that they have satisfied the FLSA.

Even though the budget impasse which caused the State to issue registered warrants has been resolved, this case is not moot because it satisfies the "capable of repetition yet evading review" exception to the mootness doctrine, since the budget impasse is likely to recur. It is therefore appropriate for the court to consider declaratory relief in this case.[3]

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consents in this action, including the plaintiffs named in the caption above.

[2] Plaintiffs do not seek summary judgment on their damages claim based on defendants' alleged violation of the FLSA. An employer who violates § 206 or § 207 is liable to the affected employee or employees for their unpaid minimum wages or overtime pay, an additional equal amount as liquidated damages, and reasonable attorney's fees and costs. 29 U.S.C. § 216(b). Attorney's fees are mandatory, but the court has discretion to award liquidated damages in accordance with proof that the employer acted in good faith and reasonably believed his or her acts did not violate the FLSA. 29 U.S.C. §§ 216(b), 260.

[3] *See Pratt v. Wilson*, 770 F. Supp. 539 (E.D. Cal. 1991), where the court held that a suit related to the State's 1990 budget impasse satisfied the "capable of repetition, yet evading review" exception to the mootness doctrine because the challenged State action was of limited duration and likely to recur, "given the fact that the state ha[d] not timely adopted a budget in five of the last eight years." *Id.* at 543. The tally is now seven of the last ten years.

II. FACTS

A. Consequences of the 1992 State budget impasse

This case represents a new phase in the State's continuing efforts to comply with the FLSA during a budget impasse. During the 1991 budget impasse, the State withheld its employees' wages until a budget passed. However, Judge Shubb held this practice violated "an implied requirement [of the FLSA] that wages be paid promptly when due." *Biggs v. Wilson*, Case No. CIV S-90-0942-WBS-GGH (E.D. Cal. October 3, 1991) at 6.[4] During the 1992 budget impasse, the State paid its employees on their regular paydays with registered warrants. The State relied on private financial institutions to purchase State employees' warrants so the employees would receive their wages without interruption despite the budget impasse.

Defendants normally pay plaintiffs' wages with regular warrants.[5] Under State law, the State can issue warrants only if two requirements are met: (1) the expenditure must be authorized by law, and (2) the particular fund the warrant is to be drawn on must have sufficient unexhausted appropriations to meet the warrant. Cal. Gov't Code § 12440.[6] If these requirements are

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[4] *Biggs v. Wilson* is currently on appeal before the Ninth Circuit, Case No. 92-15334.

[5] These warrants are also sometimes referred to in the parties' papers as "general," "normal" or "good" warrants. They are the State's equivalent of checks.

[6] This section provides: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law

met and the State has sufficient cash to pay the warrant on demand, the State issues regular warrants. If these requirements are met for warrants from the general fund, but there is insufficient cash in the general fund to issue regular warrants, the State can issue registered warrants. Cal. Gov't Code § 17221.[7]

Because the State Legislature and Governor failed to agree on a budget by the conclusion of the fiscal year ending June 30, 1992, no unexhausted appropriation was available to satisfy the statutory requirements for issuing warrants to pay plaintiffs after that date. In the absence of a budget appropriation, the State Legislature passed an emergency appropriation bill, approved by the Governor July 14, 1992, authorizing the Controller to compensate

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to be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law, and unless unexhausted specific appropriations provided by law are available to meet it."

[7] This section provides: "Whenever the Controller draws his warrant upon the Treasurer payable out of the General Fund in an amount in excess of the balance remaining in the unapplied money in the General Fund after first deducting from such unapplied money the amount, as estimated by the Controller, which is required by law to be earmarked, reserved or set apart from such unapplied money for the payment of obligations of the State having priority over the obligation to which such warrant is applicable, the Controller shall upon the same day present it to the Treasurer. The Treasurer shall endorse upon its back the date of presentation by the Controller; that it is not paid for want of funds; and that it bears interest at the rate fixed pursuant to law from the date of such registration to and including the date of maturity, or the date upon which the Treasurer first advertises that it is payable upon presentation if it bears no date of maturity. Warrants so endorsed by the Treasurer are registered warrants."

State employees for the period from July 1, 1992 until the Budget Act of 1992 was passed. 1992 Cal. Legis. Serv. No. 7, ch. 205, § 2. The purpose of the emergency appropriation bill was:

> to eliminate the possibility of injunctive relief and liquidated damages being awarded against the state under the [FLSA] in the event [state employees], whether or not subject to the [*Biggs, supra*] decision, are not paid on their regularly scheduled payday.

1992 Cal. Legis. Serv. No. 7, ch. 205, § 1(b). Because of the *Biggs* court's holding that the FLSA requires employers to pay wages promptly, the State was concerned that not paying its employees until a budget passed would violate the FLSA.[8] Gray Davis News Release dated July 10, 1992, Ex. B to Messing's decl.

Although the appropriation bill satisfied the statutory requirements for issuing warrants, the State's general fund contained insufficient cash to issue regular warrants. The budget impasse prevented the State from following its usual practice of issuing revenue anticipation notes or revenue anticipation warrants to external sources and paying State employees with regular warrants. Defs.' br. at 3, defs.' Ex. 1 at 3, 5-6. Therefore, effective July 1, 1992, the State began issuing registered warrants for all general fund obligations except priority obligations noted in the State Constitution. Defs.' Ex. 1 at

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[8] The Legislature's emergency appropriation bill, the State Controller's news release dated July 10, 1992, and the State Controller's legal staff's opinion dated July 10, 1992 all cite *Biggs*. Messing decl., Exs. A and B.

6. State employees normally paid out of the general fund received registered warrants.[9]

B. Registered warrants

Regular warrants and registered warrants are significantly different. A regular warrant is payable on demand from existing State funds, but a registered warrant is a "promise to pay." Letter from Gray Davis to all State employees, dated July 1, 1992, Ex. A to Beaver decl. However, no State funds exist to pay registered warrants when they are issued, so they are *not* payable on demand. Registered warrants are payable only when the State calls them for redemption. On redemption, the holder of the registered warrant is entitled to the face amount plus the percentage interest noted by the Treasurer on the warrant, in this case 5%. Anticipated Questions and Answers prepared by the Office of the State Controller, dated July 2, 1992, Ex. B to Beaver decl. The registered warrants issued beginning July 1, 1992 did not contain a specific redemption date. Rather, the warrants stated they were "not paid for want of funds" and would not be paid by the State until the State Treasurer "advertises that said warrant is payable upon presentation." VanHouten decl., defs.' Ex. 2, Ex. 1, Sample Warrant. Defendants expected all registered warrants issued through September 10, 1992, totalling approximately $2.65 billion, to be redeemable by September 23, 1992. Lenerd decl. dated August 31, 1992.

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[9] State employees normally paid out of special funds received regular warrants. The State's special funds did not have the same cash shortfall as its general fund.

Most State employees received cash for their registered warrants, so they were timely compensated in full as if the State had paid them with regular warrants. However, not all financial institutions cashed or accepted the registered warrants; some financial institutions conditionally accepted or refused to accept them. Decls. of McCray, Clark, Rincon and Parr; VanHouten decl., defs.' Ex. 2, Ex. 9 (policies of major banks regarding negotiating registered warrants); Broudy decl., defs. Ex. 3, Ex. A-2 (conditions on cashing/accepting registered warrants); Paulus decl., defs. Ex. 4, Ex. C-1 (Bank of America's announcement it would stop negotiating registered warrants effective August 5, 1992).

Additionally, defendants concede they knew, before issuing the registered warrants, that not all financial institutions would cash or accept the warrants. Gray Davis letter to State employees dated July 1, 1992, Ex. A to Beaver decl. (stating State Controller and Treasurer had confirmed that "most financial institutions" would cash the warrants at face value on presentation); Anticipated Questions & Answers prepared by the Office of the State Controller, dated July 2, 1992, Ex. B to Beaver decl. (stating "[M]ost major financial institutions have agreed to cash registered warrants, at least through the end of July.").

Defendants placed the task of finding a financial institution which would cash or accept the registered warrants upon State employees. Ex. B to Beaver decl. Direct deposit was not available for the registered warrants. *Id.* If employees' financial institutions would not accept registered warrants, the Controller suggested employees try other institutions. If employees chose to

remain with their own financial institutions, the Controller advised employees they would "have to hold on to the warrant until it [was] redeemable." *Id.* For the July 30 payroll *only*, the State gave any employee unable to negotiate his or her registered warrant the additional option of exchanging the warrant for "a check you can cash," drawn on the employee's agency's revolving fund. Parr decl., Ex. B; Defs. Ex. 1, Attach. 12.

III. DISCUSSION

Plaintiffs move for partial summary judgment, claiming defendants violated the FLSA by paying plaintiffs' wages with registered warrants. Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, the parties do not dispute the facts.

The State asserts that requiring it to pay its employees promptly and in cash or its equivalent as plaintiffs contend the FLSA requires would violate the Tenth Amendment. If the State must comply with the FLSA, and the FLSA requires prompt payment in cash or its equivalent, plaintiffs claim the State violated these requirements by paying plaintiffs' wages with registered warrants.

A. The Tenth Amendment and the FLSA

The State argues that requiring it to pay its employees promptly in cash or its equivalent under the FLSA would violate the Tenth Amendment because it

would undermine "the state's constitutional and statutory provisions regarding the budget process and the orderly scheme of payment of the State's obligations." Defs.' reply at 27. The State argues such a ruling would interfere with the State's sovereignty by "piercing the State's political solution to the State's fiscal crisis, and undermin[ing] the basic internal economic operations of the State itself during this fiscal crisis." *Id.*

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment states a "truism that all is retained which has not been surrendered." *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408, 2418 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462 (1941)). The purpose of the Tenth Amendment is to ensure that individuals within the various states enjoy certain freedoms under our constitutional democratic form of government. As the Supreme Court recognized in *New York v. United States:*

> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

Id. at 2431.

The Tenth Amendment confirms that the federal government has limited powers. However, Congress enacted the FLSA pursuant to its Commerce Clause powers, and requiring states to comply with the FLSA's minimum wage and overtime requirements does not violate the Tenth Amendment. *Garcia v. San Antonio Metropolitan*

Transit Authority, 469 U.S. 528, 105 S.Ct. 1005 (1985).[10] In *Garcia*, the state "face[d] nothing more than the same . . . obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554, 105 S.Ct. at 1019. The Court chose to leave the protection of states' sovereignty from the federal government's exercise of its Commerce Clause powers to the political process of federalism. *Id.* at 556, 105 S.Ct. at 1020.[11] Under *Garcia*, if states object to complying with the FLSA, their recourse is to the political process of state participation in federal governmental action.

Two recent Supreme Court opinions discuss the Tenth Amendment. In *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395 (1991), state court judges challenged a state mandatory retirement provision, alleging it violated the federal Age Discrimination in Employment Act of 1967 ("ADEA"). The Court discussed the Tenth Amendment, emphasizing the importance to state sovereignty of states deciding their own judges' qualifications: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself

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[10] *See also Bratt v. County of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 962 (1992) (citing *Garcia* and rejecting Tenth Amendment challenge to application of FLSA to county probation and child protection activities).

[11] Prior to *Garcia*, the FLSA was not applicable to the states when they were performing traditional governmental functions. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976). The *Garcia* Court rejected *National League of Cities'* "traditional governmental functions" test. *Garcia*, 469 U.S. at 556-57, 105 S.Ct. at 1020-21.

as a sovereign." *Id.* at 2400. The Court emphasized that federal courts must be certain of Congress' intent before finding that federal law overrides the constitutional balance of federal and state powers. *Id.* at 2401. Because it was not clear Congress intended the ADEA to cover state court judges, the Court held the state mandatory retirement provision did not violate the ADEA. *Id.* at 2404.

In this case, Congress' intent is clear. Congress intended by enacting the FLSA "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978) (quoting *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03, 64 S.Ct. 698, 705 (1977)). Regulations requiring employers to pay wages in cash or its equivalent are consistent with that intent.

The Supreme Court is committed to the holding of *Garcia* where Congress subjects a state to the same legislation applicable to private parties. *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992). In *New York*, the Court discussed the Tenth Amendment and distinguished federal legislation applicable to both states and private parties from federal legislation forcing states to regulate in a particular way. The Court expressly stated it was not "revisit[ing]" *Garcia's* holding. *New York*, 112 S.Ct. at 2420.

The State argues requiring it to pay its employees promptly and in cash would compromise the State's sovereignty to a degree not at issue in *Garcia*. However, requiring states to pay their employees promptly in cash

or its equivalent is no more destructive of state sovereignty than requiring states to pay statutory minimum and overtime wages.

The State emphasizes the extreme nature of its fiscal crisis. However, the State's financial problems do not determine the Tenth Amendment issue. In deciding to make states subject to the FLSA, Congress recognized that states would be "forced to assume some additional financial responsibilities." H.R. Rep. No. 99-331, 99th Congress, 1st Sess. (1985), App. D to pls.' reply. After *Garcia* was decided in 1985, Congress passed a moratorium delaying application of the FLSA to states until April 15, 1986. The moratorium reflects states protecting their sovereignty through participation in federal governmental action. It also indicates Congress supported the Court's holding in *Garcia* and was committed to giving state employees the protection of the FLSA despite the cost to states.

Based on *Garcia* and subsequent Supreme Court and Ninth Circuit cases, requiring the State to comply with the FLSA does not violate the Tenth Amendment. Therefore, the next issue is whether defendants violated the FLSA by paying plaintiffs' wages with registered warrants.

B. Violation of the FLSA

Plaintiffs allege defendants violated the FLSA in two ways: by not paying them in cash or its equivalent and by not paying them promptly. In contrast to 1991, when the State withheld employees' wages during a two-week budget impasse, in 1992, the State made timely payment,

with registered warrants. Plaintiffs allege the *form* of payment caused them to suffer damage from negotiation delays. Plaintiffs' two arguments are simply different challenges to the State's payment of wages with registered warrants. The challenge to the timeliness of payment stems from the use of an instrument that not all plaintiffs were able to freely negotiate.

The FLSA does not explicitly require employers to pay statutory wages in cash or its equivalent. However, the FLSA requires employers to pay employees a minimum hourly wage and overtime, and the FLSA's implementing regulations require payment of these statutory wages "in cash or its equivalent." 29 U.S.C. §§ 206 and 207, 29 C.F.R. § 531.27. Employers must pay statutory wages "in cash or negotiable instrument payable at par" and "finally and unconditionally or 'free and clear.' " 29 C.F.R. §§ 531.27, 531.35. They may not pay these wages in scrip or a similar medium. 29 C.F.R. § 531.34.[12]

Administrative regulations have the force of law as long as they are consistent with the purposes of the legislation. *Martinez v. Marshall*, 573 F.2d 555, 559 (9th Cir. 1977). Since the FLSA is silent on the cash/cash equivalent issue, the court must give the above cited regulations

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[12] This section provides: "Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under the [FLSA]. They are neither cash nor 'other facilities' [such as board or lodging]." 29 C.F.R. § 531.34.

"Scrip" is "a certificate of indebtedness in the form of a promise to pay or a certification good for money or goods receivable from a concern that needs funds or pays wages partly in orders on a company store." Webster's Third International Dictionary at 2041 (1986).

"controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 94 S.Ct. 2778, 2782 (1984). The cited regulations are consistent with the FLSA's stated purpose of eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and are not arbitrary or capricious. 29 U.S.C. § 202. Therefore, these regulations have the force of law.

Because the statute and regulations do not define "cash or its equivalent" and no cases have addressed whether registered warrants satisfy this requirement, the court looks to other sources to compare registered warrants to cash. These include definitions of "cash," federal regulation of the warrants, California statutes, case law, and evidence of the warrants' negotiability in fact.

1. Definitions of "cash".

Cash is "ready money," broadly including "bank deposits and certain readily negotiable paper (as checks, drafts, notes, bearer bonds, coupons)." Webster's Third International Dictionary at 346 (1986). "Cash" is distinguishable from "money":

> [M]oney is the more general term and stresses the medium or token, whereas "cash" stresses the readiness of the medium, as distinguished from credit or slow assets. "Cash" means especially "ready money" at command, subject to free disposal and not tied up in a fixed state; it is almost the equivalent of the term "loose money."

54 Am.Jur.2d, MONEY, § 2 at 552. Registered warrants are not cash under this definition, because they are not readily negotiable or freely disposable, since they are not payable on demand.

2. Federal regulation of registered warrants.

According to the Federal Reserve Bank, registered warrants are neither cash nor checks. Registered warrants are not cash under the Federal Reserve Bank's definition of noncash items for purposes of regulating checks:

> *Noncash item* means an item that would otherwise be a check except that . . . [i]t is accompanied by special instructions, such as a request for special advice of payment or dishonor.

12 C.F.R. § 229.2(u). The warrants plaintiffs received were noncash items because they were accompanied by special instructions. The warrants were "not paid for want of funds" and were not payable until the State Treasurer advertised they were payable. VanHouten decl., defs.' Ex. 2, Ex. 2 [sic]. Registered warrants also cannot be treated as checks under Federal Reserve Bank rules: "Because a registered warrant is not immediately payable, it is not considered a check." Mulford decl., Defs. Ex. 2, Ex. 6, Attach. A.

Federal banking regulators treated the registered warrants plaintiffs received not as cash or checks, but as debt securities, regulating them in the same manner as State-issued general obligation bonds. The registered warrants received "the same risk-based capital treatment

as general obligation bonds."[13] Federal regulators advised banks and thrifts that there would be "no regulatory limit on a bank's or thrift's *investment*" in registered warrants since the warrants were to be regulated as general obligation bonds. *Id.* (emphasis added) However, the regulators advised these institutions "to exercise prudent judgment in determining *whether* and the extent to which they should accept" the warrants. *Id.* (emphasis added)[14]

In sum, federal regulators required financial institutions to treat the registered warrants not as cash or checks, but as debt instruments, because they were not payable on demand as regular warrants are. This fact suggests that registered warrants are more like debt instruments than cash.

3.- California statutes.

California Government Code Section 17205 provides: "All registered warrants are negotiable instruments."[15]

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[13] Interagency Position on California Registered Warrants, dated June 30, 1992, by the Controller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Bank of San Francisco, and Office of Thrift Supervisor, Mulford decl., defs.' Ex. 6, Ex. C.

[14] Defendants argue that federal regulators "explicitly authorized the use of registered warrants." Defs. opp. at 16. However, Federal regulators did not *authorize* the State to issue registered warrants; they were concerned with *regulating* the warrants once issued. Even if Federal regulators had authorized registered warrants, this would not determine whether defendants violated the FLSA by paying plaintiffs' wages with registered warrants.

[15] The Government Code also sets out procedures a taxpayer must follow to pay the taxpayer's State taxes with a

However, registered warrants are not negotiable under the California Commercial Code, since they are not "payable on demand or at a definite time." Cal. Com. Code § 3104(c). The registered warrants plaintiffs received were not payable when financial institutions gave State employees value for them; instead, financial institutions bought the warrants to hold and collect the principal and interest when the State called the warrants for redemption.[16] The warrants were not "payable" until the State called them for payment because the word "payable" in this context means "the final act which extinguishes a negotiable instrument." 11 Am.Jur.2d, BILLS AND NOTES, § 963.

Under California law, registered warrants are more like investment securities than cash. They are "legal investments" for funds and for State agencies. Cal. Gov't Code §§ 17202, 17204. The California Commercial Code defines a "certificated security" (as distinguished from a security not represented by an instrument) as:

> a share, participation, or other interest in property or an enterprise of the issuer or *an obligation of the issuer* which is all of the following:
>
> (i) Represented by an instrument issued in bearer or *registered* form.

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registered warrant. Cal. Gov't Code § 17280.1. There would arguably be no need for this statute if registered warrants were in fact cash or its equivalent.

[16] Bank of America advised its depositors that, "A purchase occurs when a warrant is accepted for deposit . . . or cashed." Paulus decl., defs.' Ex. 4, Ex. C-1.

> (ii) Of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a *medium for investment.*
>
> (iii) Either one of a class or series or by its terms divisible into a class or *series of* shares, participations, interests, or *obligations.*

Cal. Com. Code § 8102 (emphasis added). The registered warrants plaintiffs received were like certificated securities in that they represented an obligation of the issuer, were issued in registered form, and were bought and sold to some degree in a secondary market as a medium for investment. Paulus decl., defs.' Ex. 4, Ex. B-2, Broudy decl., defs.' Ex. 3, Ex. A-1 (Golden 1 Credit Union).

4. Relevant case law.

In *Fleming v. Pearson Hardwood Flooring*, 39 F. Supp. 300 (D. Tenn. 1941), the court held that, "The minimum wage and overtime compensation prescribed by the [FLSA] must be paid to the employee in cash or by negotiable instrument payable at par." *Id.* at 302-03.[17] The defendants in *Fleming* violated the FLSA by issuing "scrip," also called "certificates of indebtedness," which had no redemption date, was not negotiable at par, and was usually not redeemable at face value. *Id.* at 303.

The scrip at issue in *Fleming* and the registered warrants at issue here are distinguishable, but also similar. They are distinguishable in that registered warrants were

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[17] *Fleming* was decided before the regulations at issue were enacted, but it is consistent with those regulations.

redeemable with interest when called by the State; the *Fleming* scrip bore no interest. The interest on the warrants gave purchasers an incentive to pay face value; conversely, the lack of interest on the *Fleming* scrip gave purchasers an incentive to discount from face value. Hence, most warrants were purchased at face value, while the *Fleming* scrip was usually not purchased at face value. Further, the registered warrants were issued by a state government rather than a private company.

The registered warrants and the *Fleming* scrip are similar in that neither had a redemption date, and neither was freely negotiable. Additionally, plaintiffs' declarations and defendants' own exhibits reflect that some financial institutions charged a fee for negotiating the registered warrants, which is comparable to the discount from face value the *Fleming* court found unacceptable. Broudy decl., defs.' Ex. 3, Ex. A-2, Drake decl.

5. Negotiability in fact.

Defendants argue the fact the "overwhelming number of recipients of [registered warrants] have been able to negotiate them" shows their "general negotiability in fact." Defs.' opp. at 19. However, defendants do not dispute plaintiffs' declarations they were unable to negotiate their warrants or experienced difficulty in negotiating them.

Defendants also argue they are not responsible for financial institutions not freely negotiating registered warrants:

> The fact that some institutions chose not to accept Registered Warrants in the first instance

> and others chose to not continue to accept them after initial acceptance, cannot be attributed to any conduct of [Defendants]. . . . [Financial institutions' policies re registered warrants] can only be attributed to commercial decisions made for commercial purposes which cannot be attributed to actions of the State.

Defs. opp. at 17. However, defendants knew registered warrants would not be freely negotiated when they issued them and that federal banking regulators had advised banks and thrifts to exercise prudence in deciding whether and in what amount to invest in the warrants. Further, defendants could have foreseen that the situation would worsen as the budget impasse persisted.

Because of this limited negotiability, plaintiffs' wages were not paid "finally and unconditionally" or "free and clear" as 29 C.F.R. § 531.35 requires. The warrants were subject to conditions as issued and as negotiated. As issued, the warrants were subject to the condition that the State would not pay them until funds were available. As negotiated, the warrants were subject to conditions including transaction fees, membership in credit unions, existing bank accounts, or additional deposits. Broudy decl., defs. Ex. 3, Ex. A-2.

IV. CONCLUSION

The FLSA requires employers to pay statutory wages in cash or its equivalent. This requirement is applicable to the State, as an employer covered by the FLSA. Application of the requirement to the State does not violate the Tenth Amendment.

Registered warrants are not cash or its equivalent. Defendants faced difficult choices in view of the State budget impasse, the general fund cash shortfall, and case law requiring prompt payment under the FLSA. However, defendants' choice to pay State employees with registered warrants violated the FLSA. The market reality that most State employees were able to sell their warrants for face value, although relevant to whether defendants attempted in good faith to comply with the FLSA, does not make the registered warrants cash or its equivalent as the FLSA requires.

Plaintiffs' motion for partial summary judgment is granted.

IT IS SO ORDERED.

Dated: November 30, 1992.

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.,
JUDGE
UNITED STATES DISTRICT
COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al. Defendants.	CIV-S-92-1115-GEB-PAN
	ORDER
	(Filed March 3, 1993)
JAMES R. ADAMS, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants,	CIV-S-92-1493-GEB-PAN
JOHNNY G. ADKINS, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	CIV-S-92-1544-GEB-PAN

The court conducted a status conference on February 26, 1993 at 1:30 p.m. Gary Messing, Cathleen Williams and Joel Levinson appeared on behalf of the *Parr* plaintiffs, Roberta Perkins appeared on behalf of the *Adams* and *Adkins* plaintiffs, and Larry Raskin and Christopher Waddell appeared on behalf of the State of California defendants.

At the last status conference in these actions, the court raised several matters which it asked the parties to consider and address in supplemental status reports. Such matters included whether the liability issues could be determined before notices were sent to potential consenters and whether the actions should be consolidated.

Following that conference, the parties met and attempted to stipulate to a plan coordinating the three cases. However, no agreement was reached. Supplemental reports were filed containing the following information: The State defendants assert that consolidation for all purposes is appropriate since it is impossible to distinguish the interests of the *Adams* and *Adkins* plaintiffs from the *Parr* plaintiffs. The *Adams* and *Adkins* plaintiffs agree that the *Adams* and *Adkins* cases can be consolidated, but oppose consolidation with the *Parr* plaintiffs[1] on the basis that they may wish to pursue theories of liability that the *Parr* plaintiffs do not. The *Parr* plaintiffs object to consolidation on the basis that individual damages determinations may be needed and the *Parr* class is already large.

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[1] The *Adams* and *Adkins* plaintiffs also oppose consolidation on the basis that some of the potential class members in the *Parr* case are exempt from the FLSA as management or administrative employees and therefore not entitled to damages. However, *Parr* counsel indicate that they have already identified the job classifications which are exempt from the FLSA and will eliminate this potential problem.

However, when the parties discussed consolidation at the February 26, 1993 hearing, there was general agreement in favor of consolidating the actions for determination of the liability issues. "The decision to consolidate rests in the trial court's sound discretion and will not be reversed absent clear error or exigent circumstances." *Investors Research Co. v. United States Dist. Ct.*, 877 F.2d 777 (9th Cir. 1989). Consolidation may be ordered on the court's own motion to allow more efficient and economic discovery, avoid unnecessary costs and delays for the court and parties and to avoid inconsistent judgments. Fed. R. Civ. P. 48(a). Courts commonly consider the complexity of the litigation and the prejudice to the parties when deciding whether to consolidate cases.

The complexity of the legal issues in these actions is not changed by the consolidation. Even if the liability issues proceed to trial the complexity of the trial will be affected only incrementally since the *Parr* case already has 5000 plaintiffs and any trial procedure must be carefully designed. Finally, none of the plaintiffs indicate they will be prejudiced by consolidation. Therefore, the *Parr*, *Adams* and *Adkins* cases are ordered consolidated for all proceedings through the determination of liability under the FLSA.

The Manual for Complex Litigation suggests the use of lead counsel and the State advocates designation of lead counsel as an efficiency measure. Since Gary Messing and Cathleen Williams of Carroll, Burdick & McDonough and co-counsel Joel Levinson obtained summary judgment and initiated discovery, they have already taken a lead litigation position and are hereby designated as lead counsel for the purposes of: (a) initiating and

organizing discovery requests and responses, and (b) conducting the principle [sic] examination of deponents. Lead counsel shall have an obligation to proceed by consensus and to maintain appropriate communication. Other counsel may conduct nonduplicative examination of witnesses.

The parties agree to defer notice to prospective class members until after the legal issues of entitlement to liquidated damages is decided. However plaintiffs reserved the right to move for an order allowing them to send those notices on an earlier date if they need to do so before the statute of limitations expires.

The next phase of this case shall focus on the following issues:

(1) Whether the State acted in bad faith and without reasonable grounds for its belief that issuance of registered warrants complied with the FLSA's manner of payment requirement.

(2) Whether plaintiffs are entitled to back pay and/or liquidated damages as actual damages.

(3) Whether plaintiffs are entitled to interest or other penalty.

(4) Whether the State acted wilfully or in reckless disregard of the FLSA, such that the statute of limitations should be extended to three years under 29 U.S.C. § 255(a).

Resolution of these issues shall be conducted according to the following schedule:

Discovery cut-off	December 31, 1993
Motion filing deadline	January 31, 1994
Law and Motion hearing date	February 28, 1994

A status conference will be scheduled following resolution of the law and motion matters. Any party may, within seven (7) calendar days after the date of this order, file and serve written objections to any provisions of this order.

IT IS SO ORDERED.

Dated: March 1, 1993

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR., JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

_____/

CIV S-92-1115 GEB PAN

ORDER

(Filed June 18, 1993)

This is an action under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. (hereafter, the "Act" or "FLSA") by state employees against the State of California and Controller for back pay and liquidated damages.

Background

By the time the state's 1991-92 fiscal-year budget expired on June 30, 1992, a new budget was not approved as a result of an impasse between the California legislature and the Governor.[1] The state legislature enacted an emergency appropriation bill (S.B. 220) authorizing the Controller to pay state employees after July 1, 1992, but the General Fund was inadequate to make the required

[1] California Constitution Art. IV, § 12 requires the governor to submit to the Legislature a consolidated administrative budget proposal covering all state revenues and expenditures in January each year and requires the Legislature to pass a budget bill by midnight, June 15, each year. Without a budget, the state has no spending authority and only limited authority to borrow.

payments.[2] The Controller requested approval of $4 billion registered reimbursement warrants to raise the required funds but the Governor refused out of concern that it would prolong the budget impasse. Accordingly, the State paid its employees with registered warrants, which are promises to pay the face value and interest when funds exist to redeem them.[3] Registered warrants for about $2.65 billion were issued through September 10, 1992. Most but not all state employees received cash for the registered warrants, which many banks cashed at face value, at least through July 1992.

The Act and implementing regulations require that employers promptly pay employees' wages in cash or its equivalent. On December 2, 1992, the Honorable Garland E. Burrell, Jr., filed an order finding that registered warrants are not cash or its equivalent and that the state therefore violated the Act. Accordingly, plaintiffs are entitled to liquidated damages pursuant to 29 U.S.C. § 216(b) unless defendants affirmatively show that they acted in good faith. Defendants bear the burden of showing that they acted in good faith, i.e., had an honest intention to

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[2] In May 1992, the projected deficit for the 1991-92 fiscal year was $3.4 billion. By April 1992, it had become apparent that the state would run out of cash to pay its obligations for the 1991-92 fiscal year. On April 22, 1992, the Controller requested authorization to transfer $4 billion to the General Cash Revolving Fund. On May 12, 1992, the governor declined because "[a]pproving the transfer of such a large amount not only presumes the Legislature will fail to send a balanced budget package to my desk within the deadline required by the State Constitution – it would encourage such failure."

[3] Calif. Gov't Code § 17221.

ascertain the requirements of the Act and reasonable grounds for believing that their conduct was not violative.

The Discovery Dispute

At the deposition of LaFenus Stancell on August 28, 1992; by interrogatories propounded by plaintiffs on November 10, 1992; and by a request for production of documents served on February 26, 1993, plaintiffs sought to discover (1) who was present during discussions within the Department of Finance about the Controller's request for approval of $4 billion revenue reimbursement warrants; (2) if recommendations were made to the Governor whether required expenditures should be authorized; (3) if particular witnesses were involved in discussions about the requirements of the Act; (4) whether such discussions occurred within state agencies; (5) whether advice of counsel was sought and obtained; (6) whether participants expressly accepted the risk of violating the Act; (7) whether the Department of Finance researched or studied the use of registered warrants; (8) if agency staff discussed whether payment by registered warrants could expose the state to FLSA liability; (9) the connection between the willingness of banks to cash registered warrants and in instruction to state agencies to exchange registered warrants for cash from agency revolving funds; (10) whether policymakers discussed a decision to authorize the use of money from revolving funds to pay employees who were unable to cash their registered warrants; (11) whether FLSA compliance was discussed by or with the Governor or his staff and, if so, the date of the discussions, the participants, the topics

discussed, the documents made and the action taken or decision made; (12) the same information about the Controller; (13) the Governor's legal staff; (14) the Controller's executive staff; and (14) other state officials; (15) defendant's contentions about compliance with the Act;[4] (16) whether responsible state officials relied upon the analysis, research and opinions provided to them; (17) whether state officials discussed passage of SB-220 and, if so, the persons involved, etc.; (18) whether state officials knew that employees experienced delay in converting registered warrants to cash and, if so, the details of the information;[5] and (19) documents relating to such inquiries including press releases and public statements, communications with recipients of registered warrants, memorandums about FLSA compliance, and officials, calendars recording pertinent appointments and meetings.

To these requests, defendants asserted executive, official information, confidential state secrets, deliberative process, attorney-client, attorney work product, and "litigation" privileges. Defendants also object to providing document discovery upon the grounds that some of the documents requested are "equally available" to plaintiff. As noted, defendants contend that they have answered some of the questions presented by plaintiff's motion. Defendants also contend that, as plaintiffs "filed their lawsuit while many of the matters were still unfolding during the midst of the budget crisis," much of plaintiffs, discovery implicates "not just the subject matter of this

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[4] Defendants answered these questions.

[5] Defendants admit that its failure to respond was an oversight that will be corrected.

litigation – the payment of registered warrants to state employees – but the litigation itself." Finally, defendants also contend that on March 31, 1993, defendants presented to plaintiffs a nine-page letter "*detailing* its case on the good faith phase of this litigation" and that defendants are "willing to 'live or die' by the case" defendants outlined. Defendants contend that "[t]he State's good faith defense," as the state has defined it, "essentially defines the discovery required." In pursuance of this approach, defendants made available for their depositions the Chief Counsel of the California Department of Personnel Administration and Chief Counsel for the Office of the Controller and "offered to partially waive the attorney-client and attorney work-product privilege."

In support of defendants' claim of deliberative process privilege, defendants have proffered the declaration of Bob White, the chief of staff to Governor Wilson. White explains that the Governor is responsible for submitting an annual budget proposal to the Legislature in January each year and that this responsibility is chiefly discharged by the Department of Finance. The process depends upon information from many sources, comparisons of competing needs, and developing priorities consistent with fiscal constraints; "frank and open discussion of priorities and realistic constraints is encouraged." White states that "opening this deliberative process to public scrutiny would prevent it from occurring or change its character in ways which would greatly diminish its effectiveness."

Also in support of defendants' privilege claims, on June 3, 1993, defendants served an Amended Privilege Log in connection with plaintiffs' request for production

of documents and the deposition of Chris Waddell. The document is a log of 41 items including the following entries by way of example:

No.	Document	Author	Date	Subject	Exemption
1.	Memo	W	Undated	RAW	Deliberative Process Privilege
8.	Attorney General's Office Memorandum & Telephone Notes	Z, S	Undated	Budget Issues,	Attorney-Client Attorney Work-Product Deliberative Process Privilege Litigation Privilege

. . .

Plaintiffs contend that many of their inquiries do not implicate privileged information, e.g., the identity of participants to and the subject of pertinent discussions, that defendants have waived their privileges by asserting a good faith defense and by not properly supporting their privilege claims.

Scope of Discovery

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for

objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26.

Defendants contend that they have agreed to confine their good faith defense by a March letter to plaintiffs' counsel and that discovery should be limited to the "case the State intends to put on." The state explained that this suggestion would limit unnecessary infringement of delicate and plentiful state privileges; the quid pro quo to plaintiffs was:

> Along with learning now, directly, what is the State's case, which the State is willing to limit itself generally, at trial, Plaintiffs get to focus their discovery on what is relevant – the State's layout of its good faith defense – and do not have to waste time or resources on other indirect, unrelated matters not part of the State's case. [¶] The result is that not only is the State limiting itself at trial as to what will be included in its case, but the State is binding itself not to put on evidence at trial not ultimately disclosed as part of its case, and not to putting on witnesses which the State has not ultimately made available for deposition.

Not surprisingly, plaintiffs have not accepted the suggestion and, of course, they were not bound to. The good faith defense to FLSA liability defined by federal law is the "subject matter involved in the pending action" for purposes of discovery; the defense is not defined by the evidence that the defendant might select to support it.

The defense has two components: (1) a subjective aspect of good faith requiring the state to demonstrate an

honest intention to ascertain and comply with the Act and (2) an objective aspect using reasonable grounds as a standard to judge the state's behavior. *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1071-72 (9th Cir. 1990), *cert. denied*, 498 U.S. 1086, 111 S.Ct. 962 (1991).

Deliberative Process Privilege

Federal privilege law governs this action. Fed. R. Ev. 501;[6] (9th Cir. 1975), *aff'd* 426 U.S. 394, 96 S.Ct. 2119 (1976). The burden of establishing a claim of privilege rests on the party asserting it; that party must explain how the information sought fits within the privilege. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

The rules of federal privilege promulgated by the Supreme Court in November 1972, although not adopted by Congress, restated federal law and represent a guide to the federal law of privilege. 2 Weinstein's Evidence, 501[03], p. 501-34.[7]

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[6] "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim of defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

[7] *See also Association for Women in Science v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977); *In re Franklin Nat. Bank Secur.*

In pertinent part, proposed rule 509 states a privilege for official information as follows:

> Official information is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions.

The essential public interest served by an official information privilege is encouragement of a frank and uninhibited exchange of ideas during the process of deliberating a governmental policy or decision. The legitimate public concern is that the formative, deliberative process be so open to debate and criticism that responsible participants might not dare to innovate and might withhold from consideration their best ideas, opinions, and advice.[8] *See, e.g., Binion v. United States Dept. of Justice*, 695 F.2d 1189 (9th Cir. 1983). The privilege, thus, is limited to "intragovernmental opinions and recommendations." Discussion and exchange of views that are not intended to contribute to formation of a policy or decision are not within the privilege. Only ideas, not facts, and the "process," not the outcome, are protected. Thus, for instance, an oral or written statement embodying,

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Litigation, 478 F.Supp. 577, 580 (E.D.N.Y. 1979); *United States v. Fatico*, 441 F.Supp. 1285 (E.D.N.Y.), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978).

[8] A government entity may also have special concerns about its external sources of facts, but it has not been raised. *See, e.g.*, proposed rule 502 (required reports privilege).

articulating or explaining a final conclusion, that does not itself reveal the process by which it was reached, is not within the privilege. *See N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504 (1975). The privilege does not support suppression of public debate or communications between the government and outsiders.

As attorney-client, physician-patient and spousal privileges serve the relationships to which they apply, the official information privilege serves the public interest in effective government but only to the extent it is dependent upon candid and frank discussion about governmental decisions and policy in order to function effectively. Because successful assertion of the privilege can compromise the public interest in the search for truth within the courtroom, the threshold inquiry explicitly required by rule 509 is whether disclosure is "contrary to the public interest." In other words, the utility of recognizing the privilege to the public entity asserting it must be weighed against the burden upon the public interest in the integrity of the judicial fact-finding process.

The privilege ought to be claimed by the affidavit of the government official responsible for the pertinent policy or decision. This affidavit must articulate the specific governmental interest in preserving confidences shared in the process of deliberating a particular policy or decision, not a general interest in protecting deliberative processes. To permit a court to satisfy its obligation to determine whether the government entity's particular interest outweighs the public interest in full development of facts needed for a just determination of the litigation, the privilege claims must also be supported by an explanation of how disclosure would harm frank discussion,

the relevancy of the evidence to the issue, and the availability of other evidence.

If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the court must make any further orders which the interests of justice require, including finding against the government upon an issue. Proposed Rule 509(e).

Defendants have asserted the deliberative process privilege to resist identifying the persons present during relevant discussions and involved in the process and whether there was protected discussion (e.g., whether any recommendations were made at particular meetings), the facts and information available to the decisionmakers, as well as to resist disclosure of *any* of the content of the dialogue within the government leading up to the decision to pay employees with registered warrants.

The names of the state officials who participated in making the decision to pay employees with registered warrants, which Judge Burrell found are not cash or its equivalent and, hence, violated the Act, are not arguably protected by the deliberative process privilege; neither are the facts about when and where pertinent meetings and discussions occurred, the facts that were considered in reaching the decision, the existence of documents recording such meetings and discussions, or the contents of documents to the extent they may only state, explain or justify the decision actually made vis-a-vis the process that produced it. Such information does not threaten the public interest in frank discussion during deliberation of state policy.

The exchange of ideas, recommendations made and opinions expressed during deliberation of the state's decision to pay employees with registered warrants are within the privilege if it is timely claimed and supported by a suitable affidavit. Defendants have not adequately supported their refusals to disclose the "frank discussion" protected by the privilege; through Mr. White's declaration, defendants have demonstrated only the state's general interest in protecting its deliberative processes.

Accordingly, for each claim of deliberative process privilege heretofore asserted by defendants in response to plaintiffs' discovery requests, whether at deposition or by interrogatory or request for production of documents, the state must within 30 days answer whether the discussions inquired about occurred and, if they did, identify when, who participated, the topic of the discussion, and the decision reached, if any. If defendants resist disclosure of the sort of "frank discussion" that is within the privilege, they must support their claim with the affidavit of the appropriate government official.

The required demonstration may be made by Mr. White, as chief of staff to Governor Wilson, only with respect to decisions made by the Governor and, otherwise, must be made by the public official responsible for the particular decision implicated. In each case, such affidavit must articulate how a particular disclosure would harm frank discussion essential to specifically identified governmental interests apart from a general interest in frank discussion of ideas. The defendants' support for such a privilege claim must also address the relevancy and materiality of the information to the good

faith defense and the availability of other evidence, if any, such that the court may satisfy its obligation to determine whether such specific interest outweighs the public interest in full development of the facts needed for a just determination of this litigation and whether, if the privilege is sustained, the interests of justice require a finding against defendants upon the issue of their good faith. Insofar as necessary to preserve their privilege claims, defendants may make such demonstration ex parte and in camera.

Attorney-Client Privilege

A client has a privilege to refuse to disclose confidential communications made to facilitate the rendition of professional legal services to the client. Proposed Rule 503(b). The privilege will be sustained only when necessary to achieve its limited purpose of encouraging frank disclosure *by client to attorney. Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992). To support the claim of privilege, the proponent must at a minimum show that a communication was made by a client to an attorney, in confidence and to facilitate the rendition of professional legal services (or that an attorney's communication under such circumstances would disclose the client's confidential communication to the attorney).

When state officials were asked such questions as whether the state ran the risk of violating the FLSA, whether the question was the subject of "research or study," whether the state's exposure to liability was discussed, whether FLSA compliance was discussed, and

whether legal advice was obtained, defendants also claimed attorney-client privilege.

Inasmuch as, by asserting the good faith defense, the state has effectively alleged that it had an "honest intention" to ascertain the legal requirements of the FLSA and reasonable grounds to believe that their conduct complied, plaintiff's questions probing whether and how the state informed itself – which do not touch the state's actual confidential communications to its attorneys – are both relevant and entirely outside the attorney-client privilege.

Some of the persons who participated on behalf of the state may have been attorneys acting as state policymakers or decisionmakers vis-a-vis rendering professional legal service; their advice and recommendations are also outside the privilege.

It is unclear exactly what legal advice or recommendation was given to the state that the state claims is privileged because it might disclose confidential communications by the state, as client, to its attorneys. It was apparently no secret that state decisionmakers were concerned about FLSA liability. *See, e.g.*, Legislative Counsel's Digest, S.B. 220, Jan. 23, 1991. Further, the state's fiscal tools for dealing with a budget impasse are a function of the state constitution and statutes and are not confidential. Nevertheless, assuming that the state might make the required demonstration of a confidential communication from client to attorney, the communication would be privileged. But, if the same communication inextricably included advice about whether the use of registered warrants complied or might not comply with

the FLSA, defendants either waive the privilege or impliedly consented to disclose the information by asserting a good faith defense, which for all intents and purposes is no different than an "advice of counsel" defense. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991), *cert. denied* 112 S.Ct. 63 (1991); *Ward v. Succession of Freeman*, 854 F.2d 780, 787-788 (5th Cir. 1988), *cert. denied* 490 U.S. 1065, 109 S.Ct. 2064 (1989); *Sedco Int'l. S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982), *cert. denied* 459 U.S. 1017, 103 S.Ct. 379 (1982); *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Cal. 1976); *also see United States v. Aronoff*, 466 F.Supp. 855, 862 (S.D.N.Y. 1979); 2 Weinstein's Evidence, "Privileges," § 511[02], pp 511-7.[9]

Accordingly, defendants must either withdraw their good faith defense or disclose all of the advice of counsel they received concerning FLSA compliance.

Attorney Work Product

The mental impressions, conclusions, opinions, and legal theories of an attorney concerning the litigation are

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[9] Proposed Rule of Evidence 511 provides that a person waives a privilege "if he . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication." By pleading the good faith defense, defendants implicitly averred both that they sought advice of counsel about the pertinent FLSA requirements and proceeded upon a reasonable belief that their conduct complied based upon such advice. For purposes of Rule 511, this amounts to a voluntary disclosure of significant parts of the matter and a waiver of any confidential communications upon the subject.

outside the scope of discovery. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947). In that case, within three days after the tug John M. Taylor sank and nine crewmen, including Norman Hickman, drowned, the owners engaged counsel to defend whatever litigation might arise. After suit was filed, plaintiffs sought memorandums of statements made by the surviving crewmembers. Under such circumstances, the Court held that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." In a concurring opinion in *Hickman*, Justice Jackson explained that "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." The Court also held, however, that where relevant and non-privileged facts are hidden in an attorney's file and production of such facts is essential to the preparation of the adversary's case, discovery might be had. Thus, production of written statements and documents might be justified as where, for example, the witnesses were no longer available. But what an attorney might remember or may have seen fit to write down about an oral statement by a witness is absolutely protected.[10]

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[10] The Court said that "[u]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney . . . an ordinary witness. The standards of the profession would thereby suffer. . . . Petitioner's counsel frankly admits that he wants the

This "work-product" rule is now codified in Fed.R.Civ.P. 26, which provides:

> a party may obtain discovery of documents and tangible things otherwise discoverable and "prepared in anticipation of litigation or for trial by or for another party or . . . his representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions,

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oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. . . . " If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." In *Upjohn Co. v. United States*, 449 U.S. 383, 400-402, 101 S.Ct. 677, 688-89 (1981), the Supreme Court again considered access to work product based on oral statements from witnesses, which the court found "reveal the attorneys' mental processes in evaluating . . . communications." The Court said that "[w]hile we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made . . . or applied . . . in this case would be necessary to compel disclosure." On this tenuous base, the Ninth Circuit Court of Appeals has held that work product may be discovered "when mental impressions are at issue in a case and the need for the material is compelling." *Holmgren v. State Farm Mutual Automobile Ins. Co.*, 1992 U.S. App. Lexis 29008, 92 Daily Journal DAR 15099 (9th Cir. 1992). The court did not explain why it chose to dilute absolute protection for opinion work product rather than find implied consent to disclosure or waive the protection when a party defends an action on the basis of its alleged good faith.

> conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Fed.R.Civ.P. 26(b) (3).

Asked whether "any research or study [was] done within the Department of Finance about the issuance of registered warrants as a form of indebtedness," counsel claimed work-product privilege. Likewise, counsel claimed work-product protection when plaintiff asked whether "any . . . staff discussed whether the issuance of registered warrants could expose the state to liability for nonpayment of wages under the Fair Labor Standards Act." This action was filed before the state ceased paying its employees with registered warrants. Accordingly, when a state witness was asked "whether the state ran the risk of violating the FLSA," counsel objected upon the ground that plaintiffs were "asking about discussions about ongoing litigation."

The difficulty is that at the same time defendants might have in good faith undertaken to inform themselves about the legal requirements of the FLSA, they necessarily must have anticipated litigation. The work product doctrine exists to ensure that in preparing a client's case for trial, a lawyer be allowed to assemble and sift information, identify strengths and weaknesses, and make his plan for presenting his case. The identification of strengths and weaknesses is apt to be particularly relevant to the question whether defendants had reasonable grounds to believe their continued use of registered warrants complied with the FLSA. To give absolute protection to defendants' attorneys' mental impressions, conclusions, opinions, or legal theories prepared in anticipation of this litigation, thus bars plaintiffs from

access to information relevant to test defendants' good faith defense. Under such circumstances, defendants must be deemed to have waived the privilege or to have consented to disclose the information. Alternatively, I find that defendants have put their opinion work product in issue by pleading good faith as a defense and that plaintiff's need for the information is compelling. *See Holmgren v. State Farm Mutual Automobile Ins. Co.*, 1992 U.S. App. Lexis 29008, 92 Daily Journal DAR 15099 (9th Cir. 1992).

Equal Availability

Plaintiffs also sought to require defendants to produce for inspection "Moody's Investor's Service publications referring to California's issuance of registered warrants in 1992." Defendants objected upon the ground that the documents are equally available to plaintiff as to the State. Plaintiffs argue that Moody's refers to the warrants as "scrip" and that plaintiffs are entitled to know whether defendants possessed such information.[11]

Defendants must produce the requested documents. As plaintiffs argue, whether defendants knew that

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[11] Plaintiffs also requested production of all press releases or public statements about financial institution acceptance or rejection of registered warrants. Defendants objected upon the ground that the information was equally available to plaintiffs but undertook to produce the documents. While, therefore, it is unnecessary to decide the question, the court doubts that defendants could demonstrate that defendants' press releases and public statements made in 1992 are, or were ever, "equally available" to plaintiffs.

Moody's referred to registered warrants as "scrip" is relevant to the subject matter of this action.

Conclusion

Defendants have not sustained their privilege claims. Accordingly, within 20 days after service of this order, defendants shall provide to plaintiffs in writing all documents and information previously withheld under a claim of privilege or, as to deliberative process privilege, make the demonstration required to support such a claim pursuant to the terms of this order.

It is so ordered.

Date: June 17, 1993.

/s/ Peter A. Nowinski
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Individually and On Behalf of Other Persons Similarly Situated, Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	CIV S-92-1115 GEB PAN **ORDER** (Filed Sept. 29, 1993)

Defendant State of California requests reconsideration of the magistrate judge's order filed June 18, 1993, compelling their response to Plaintiff's discovery requests. Pursuant to Local Rule 304(f) and Fed. R. Civ. P. 72(a), magistrate judge's orders shall be upheld unless "clearly erroneous or contrary to law." Upon review of the briefs on the motion to compel and oral argument, the Court finds that the magistrate judge's ruling was not clearly erroneous or contrary to law. Therefore, the Court adopts and affirms Magistrate Judge Nowinski's order filed June 18, 1993.

IT IS SO ORDERED.

DATED: September 28, 1993

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
Defendants.
_____/

CIV S-92-1115-GEB PAN

JAMES R. ADAMS, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
Defendants.
_____/

CIV S-92-1493-GEB PAN

JOHNNY G. ADKINS, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
Defendants.
_____/

CIV S-92-1544-GEB PAN

ORDER

(Filed Jan. 6, 1994)

At the deposition of Robert W. Hauck on October 25, 1993, defendant instructed the witness not to answer questions claiming deliberative process and attorney client privilege. Plaintiffs moved to compel answers pursuant to Fed.R.Civ.P. 37 upon the ground that the instructions violated the court's order filed June 18, 1993,

requiring defendants to disclose the same genre of information or withdraw their good faith defense.

The district judge adopted that order on September 29, 1993.

On November 17, 1993, to allow defendants to seek relief from the court of appeals, Judge Burrell approved a stipulation staying the June 18, 1993, order until November 11, 1993. On November 17, 1993, the court of appeals summarily denied defendants' petition for a writ of mandate. On December 13, 1993, defendants moved for an order staying discovery or the June order. On December 29, 1993, the district court denied defendants' motion to stay discovery.

On October 25, 1993, when defendants' counsel instructed the witness not to answer questions, the June 18, 1993, order was extant and no relief from the order had been sought. At the deposition, defendants did not seek a protective order pursuant to Fed.R.Civ.P. 30(d); they now, however, oppose upon the ground that they are "preparing to file a Petition for Writ of Certiorari to the United States Supreme Court to review the Ninth Circuit's decision not to grant the Mandamus Petition." This is the same argument previously rejected by the district court.

Plaintiffs' motion to compel is granted. The deposition of Mr. Hauck shall be resumed but not within 30 days after service of this order in order to allow defendants' opportunity to seek a stay from the Supreme Court. When his deposition is resumed, Mr. Hauck shall answer the questions propounded to him on October 25,

1993, and other questions relevant to defendants' good faith defense.

Counsel for defendants are admonished that their instructions to Mr. Hauck to refuse to answer the questions put to him on October 25, 1993, constitute a violation of the court's order of June 18, 1993. Defendants are warned that any other refusal to provide discovery except in compliance with such order will result in an order pursuant to Fed.R.Civ.P. 37(b) refusing to allow defendants to support their good faith defense, an order striking defendants' good faith defense and rendering a judgment by default against defendants and an order awarding plaintiffs their expenses of a motion for such relief.

It is so ordered.

Date: January 5, 1994.

/s/ Peter A. Nowinski
U.S. Magistrate Judge

29 U.S.C.S. § 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action. Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall

terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)].

* * *

29 U.S.C.S.

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

(May 14, 1947, c. 52, § 11, 61 Stat. 89; Apr. 8, 1974, Pub.L. 93-259, § 6(d)(2)(B), 88 Stat. 62.)

29 C.F.R. § 531.27 Payment in cash or its equivalent required.

(a) Standing alone, sections 6 and 7 of the Act require payments of the prescribed wages, including overtime compensation, in cash or negotiable instrument payable at par. Section 3(m) provides, however, for the inclusion in the "wage" paid to any employee, under the conditions which it prescribes of the "reasonable cost," or "fair value" as determined by the Secretary, of furnishing such employee with board, lodging, or other facilities. In addition, section 3(m) provides that a tipped employee's wages may consist in part of tips. It is section 3(m) which permits and governs the payment of wages in other than cash.

* * *

29 C.F.R. § 531.34 Payment in scrip or similar medium not authorized.

Scrip, tokens, credit cards, "dope checks," coupons, and similar devices are not proper mediums of payment under the Act. They are neither cash nor "other facilities" within the meaning of section 3(m). However, the use of such devices for the purpose of conveniently and accurately measuring wages earned or facilities furnished during a single pay period is not prohibited. Piecework earnings, for example, may be calculated by issuing tokens (representing a fixed amount of work performed) to the employee, which are redeemed at the end of the pay period for cash. The tokens do not discharge the obligation of the employer to pay wages, but they may enable him to determine the amount of cash which is due to the employee. Similarly, board, lodging, or other factilities may be furnished during the pay period in exchange for scrip or coupons issued prior to the end of the pay period. The reasonable cost of furnishing such facilities may be included as part of the wage, since payment is being made not in scrip but in facilities furnished under the requirements of section 3(m). But the employer may not credit himself with "unused scrip" or "coupons outstanding" on the pay day in determining whether he has met the requirements of the Act because such scrip or coupons have not been redeemed for cash or facilities within the pay period. Similarly, the employee cannot be charged with the loss or destruction of scrip or tokens.

29 C.F.R. § 531.35 "Free and clear" payment; "kick-backs."

Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

Federal Rules of Civil Procedure

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * *

(b) Failure to Comply With Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designate claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

AMENDMENT 10

Powers reserved to states or people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

California Const. Art. 3

§ 3.5. Administrative agencies; prohibition against declaring statute unenforceable or unconstitutional; exceptions

Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Added June 6, 1978.)

California Const. Art. IV

§ 12. Budgets; Budget bills; Appropriations

(a) Within the first 10 days of each calendar year, the Governor shall submit to the Legislature, with an explanatory message, a budget for the ensuring fiscal year containing itemized statements for recommended state expenditures and estimated state revenues. If recommended expenditures exceed estimated revenues, the Governor shall recommend the sources from which the additional revenues should be provided.

(b) The Governor and the Governor-elect may require a state agency, officer or employee to furnish whatever information is deemed necessary to prepare the budget.

(c) The budget shall be accompanied by a budget bill itemizing recommended expenditures. The bill shall be introduced immediately in each house by the persons chairing the committees that consider appropriations. The Legislature shall pass the budget bill by midnight on June 15 of each year. Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature.

(d) No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall

vote entered in the journal, two thirds of the membership concurring.

(e) The Legislature may control the submission, approval, and enforcement of budgets and the filing of claims for all State agencies.

California Const. Art. 16

§ 1. Debt limit; authorization to borrow; repayment

Section 1. The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars ($300,000), except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. Full publicity as to matters to be voted upon by the people is afforded by the setting out of the complete text of the proposed laws, together with the arguments for and against them, in the

ballot pamphlet mailed to each elector preceding the election at which they are submitted, and the only requirement for publication of such law shall be that it be set out at length in ballot pamphlets which the Secretary of State shall cause to be printed. The Legislature may, at any time after the approval of such law by the people, reduce the amount of the indebtedness authorized by the law to an amount not less than the amount contracted at the time of the reduction, or it may repeal the law if no debt shall have been contracted in pursuance thereof.

Notwithstanding any other provision of this Constitution, Members of the Legislature who are required to meet with the State Allocation Board shall have equal rights and duties with the nonlegislative members to vote and act upon matters pending or coming before such board for the allocation and apportionment of funds to school districts for school construction purposes or purposes related thereto.

Notwithstanding any other provision of this constitution, or of any bond act to the contrary, if any general obligation bonds of the state heretofore or hereafter authorized by vote of the people have been offered for sale and not sold, the Legislature may raise the maximum rate of interest payable on all general obligation bonds authorized but not sold, whether or not such bonds have been offered for sale, by a statute passed by a two-thirds vote of all members elected to each house thereof.

The provisions of Senate Bill No. 763 of the 1969 Regular Session,[1] which authorize an increase of the state

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[1] Stats.1969, c. 740, p. 1479.

general obligation bond maximum interest rate from 5 percent to an amount not in excess of 7 percent and eliminate the maximum rate of interest payable on notes given in anticipation of the sale of such bonds, are hereby ratified.

California Const. Art. 16

§ 1.5 General obligation bond proceeds fund

Sec. 1.5. The Legislature may create and establish a "General Obligation Bond Proceeds Fund" in the State Treasury, and may provide for the proceeds of the sale of general obligation bonds of the State heretofore or hereafter issued, including any sums paid as accrued interest thereon, under any or all acts authorizing the issuance of such bonds, to be paid into or transferred to, as the case may be, the "General Obligation Bond Proceeds Fund." Accounts shall be maintained in the "General Obligation Bond Proceeds Fund" of all moneys deposited in the State Treasury to the credit of that fund and the proceeds of each bond issue shall be maintained as a separate and distinct account and shall be paid out only in accordance with the law authorizing the issuance of the particular bonds from which the proceeds were derived. The Legislature may abolish, subject to the conditions of this section, any fund in the State Treasury heretofore or hereafter created by any act for the purpose of having deposited therein the proceeds from the issuance of bonds if such proceeds are transferred to or paid into the "General Obligation Bond Proceeds Fund" pursuant to the authority granted in this section; provided, however, that nothing in this section shall prevent the Legislature from reestablishing any bond proceeds fund so abolished and transferring back to its credit all proceeds in the "General Obligation Bond Proceeds Fund" which constitute the proceeds of the particular bond fund being re-established.

California Const. Art. 16

§ 2. Amendments to Constitution providing for issuance and sale of bonds

Sec. 2. (a) No amendment to this Constitution which provides for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors, nor shall any such amendment to the Constitution hereafter submitted to or approved by the electors become effective for any purpose.

Each measure providing for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors in the form of a bond act or statute.

(b) The provisions of this Constitution enumerated in subdivision (c) of this section are repealed and such provisions are continued as statutes which have been approved, adopted, legalized, ratified, validated, and made fully and completely effective, by means of the adoption by the electorate of a ratifying constitutional amendment, except that the Legislature, in addition to whatever powers it possessed under such provisions, may amend or repeal such provisions when the bonds issued thereunder have been fully retired and when no rights thereunder will be damaged.

(c) The enumerated provisions of this Constitution are: Article XVI, Sections 2, 3, 4, 4½, 5, 6, 8, 8½, 15, 16, 16.5, 17, 18, 19, 19.5, 20 and 21.

California Const. Art. 16

§ 7. Public money; appropriations; warrants

Sec. 7. Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant.

California Const. Art. XVI.

§ 8. School funding priority

(a) From all state revenues there shall first be set apart the moneys to be applied by the state for support of the public school system and public institutions of higher education.

(b) Commencing with the 1990-91 fiscal year, the moneys to be applied by the state for the support of school districts and community college districts shall be not less than the greater of the following amounts:

(1) The amount which, as a percentage of General Fund revenues which may be appropriated pursuant to Article XIII B, equals the percentage of General fund revenues appropriated for school districts and community college districts, respectively, in fiscal year 1986-87.

(2) The amount required to ensure that the total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to Article XIII B and allocated local proceeds of taxes shall not be less than the total amount from these sources in the prior fiscal year, excluding any revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment and adjusted for the change in the cost of living pursuant to paragraph (1) of subdivision (e) of Section 8 of Article XIII B. This paragraph shall be operative only in a fiscal year in which the percentage growth in California per capita personal income is less than or equal to the percentage growth in per capita General Fund revenues plus one half of one percent.

(3)(A) The amount required to ensure that the total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to Article XIII B and allocated local proceeds of taxes shall equal the total amount from these sources in the prior fiscal year, excluding any revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment and adjusted for the change in per capita General Fund revenues.

(B) In addition, an amount equal to one-half of one percent times the prior year total allocations to school districts and community colleges from General Fund proceeds of taxes appropriated pursuant to Article XIII B and allocated local proceeds of taxes, excluding any revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment.

(C) This paragraph (3) shall be operative only in a fiscal year in which the percentage growth in California per capita personal income in a fiscal year is greater than the percentage growth in per capita General Fund revenues plus one half of one percent.

(c) In any fiscal year, if the amount computed pursuant to paragraph (1) of subdivision (b) exceeds the amount computed pursuant to paragraph (2) of subdivision (b) by a difference that exceeds one and one-half percent of General Fund revenues, the amount in excess of one and one-half percent of General Fund revenues shall not be considered allocations to school districts and community colleges for purposes of computing the amount of state aid pursuant to paragraph (2) or 3 of subdivision (b) in the subsequent fiscal year. (d) In any fiscal year in which

school districts and community college districts are allocated funding pursuant to paragraph (3) of subdivision (b) or pursuant to subdivision (h), they shall be entitled to a maintenance factor, equal to the difference between (1) the amount of General Fund moneys which would have been appropriated pursuant to paragraph (2) of subdivision (b) if that paragraph had been operative or the amount of General Fund moneys which would have been appropriated pursuant to subdivision (b) had subdivision (b) not been suspended, and (2) the amount of General Fund moneys actually appropriated to school districts and community college districts in that fiscal year.

(e) The maintenance factor for school districts and community college districts determined pursuant to subdivision (d) shall be adjusted annually for changes in enrollment, and adjusted for the change in the cost of living pursuant to paragraph (1) of subdivision (e) of Section 8 of Article XIII B, until it has been allocated in full. The maintenance factor shall be allocated in a manner determined by the Legislature in each fiscal year in which the percentage growth in per capita General Fund revenues exceeds the percentage growth in California per capita personal income. The maintenance factor shall be reduced each year by the amount allocated by the Legislature in that fiscal year. The minimum maintenance factor amount to be allocated in a fiscal year shall be equal to the product of General Fund revenues from proceeds of taxes and one-half of the difference between the percentage growth in per capita General Fund revenues from proceeds of taxes and in California per capita personal

income, not to exceed the total dollar amount of the maintenance factor.

(f) For purposes of this section, "changes in enrollment" shall be measured by the percentage change in average daily attendance. However, in any fiscal year, there shall be no adjustment for decreases in enrollment between the prior fiscal year and the current fiscal year unless there have been decreases in enrollment between the second prior fiscal year and the prior fiscal year and between the third prior fiscal year and the second prior fiscal year.

(h) Subparagraph (B) of paragraph (3) of subdivision (b) may be suspended for one year only when made part of or included within any bill enacted pursuant to Section 12 of Article IV. All other provisions of subdivision (b) may be suspended for one year by the enactment of an urgency statute pursuant to Section 8 of Article IV, provided that the urgency statute may not be made part of or included within any bill enacted pursuant to Section 12 of Article IV.

California Government Code

§ 12440. Controller to draw warrants; When warrant not to be drawn

The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the treasury; but a warrant shall not be drawn unless authorized by law, and unless unexhausted specific appropriations provided by law are available to meet it.

Government Code

§ 16310. Exhaustion of general fund; transfers from other funds; interest

When the General Fund in the Treasury is or will be exhausted, the Controller shall notify the Governor and the Pooled Money Investment Board. The Governor may order the Controller to direct the transfer of all or any part of the money not needed in other funds or accounts to the General Fund from *those* funds or accounts, as determined by the Pooled Money Investment Board, including the Surplus Money Investment Fund or the Pooled Money Investment Account. All money so transferred shall be returned to the funds or accounts from which it was transferred as soon as there is sufficient money in the General Fund to return it. No interest shall be charged or paid on any transfer authorized by this section, exclusive of the Pooled Money Investment Account, except as provided herein. This section does not authorize any transfer which will interfere with the object for which a special fund was created nor any transfer from the Central Valley Water Project Construction Fund, the Central Valley Water Project Revenue Fund, or the California Water Resources Development Bond Fund.

* * * *Interest shall be paid on all money transferred to the General Fund from the Department of Food and Agriculture Fund and the Acala Cotton Fund pursuant to this section. With respect to all other funds, if* the total money transferred to the General Fund in any fiscal year from any special fund pursuant to this section exceeds an amount equal to 10 percent of the total additions to surplus available for appropriation as shown in the statement of

operations of the preceding fiscal year as set forth in the annual report of the Controller, interest shall be paid on *the* excess. Interest payable under this section shall be computed at a rate determined by the Pooled Money Investment Board to be the current earning rate of the fund from which transferred.

California Government Code

§ 17205. Negotiability

All registered warrants are negotiable instruments.

California Government Code

§ 17221. Warrants not paid for want of funds, registration procedure

Whenever the Controller draws his warrant upon the Treasurer payable out of the General Fund in an amount in excess of the balance remaining in the unapplied money in the General Fund after first deducting from such unapplied money the amount, as estimated by the Controller, which is required by law to be earmarked, reserved or set apart from such unapplied money for the payment of obligations of the State having priority over the obligation to which such warrant is applicable, the Controller shall upon the same day present it to the Treasurer. The Treasurer shall endorse upon its back the date of presentation by the Controller; that it is not paid for want of funds; and that it bears interest at the rate fixed pursuant to law from the date of such registration to and including the date of maturity, or the date upon which the Treasurer first advertises that it is payable upon presentation if it bears no date of maturity. Warrants so endorsed by the Treasurer are registered warrants.

California Government Code

§ 17300. Insufficient General Fund moneys for payment of appropriations; demands prior to receipt of income; issuance of notes

Whenever the Controller determines that moneys in the General Fund are, or are expected to be, insufficient for the payment of all appropriations by the Legislature which are required to be paid in the then current fiscal year out of the General Fund, the Controller, based upon his or her estimate of the probable income to the General Fund during the then current fiscal year and the probable dates of receipt thereof, may draw a demand or demands against appropriations made from the General Fund to be paid in the then current fiscal year prior to the receipt of the income, and deliver the demand or demands to the Treasurer. The Treasurer shall register the demand or demands for nonpayment and may issue notes by resolution pursuant to Section 17302.

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
Gerrit J. Buddingh', Esq.
CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION
3780 rosin Court, Suite 200
Sacramento, CA 95834
(916) 923-6060

Attorneys for Plaintiffs and Consenters

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA; GRAY DAVIS, CONTROLLER OF THE STATE OF CALIFORNIA, Defendants. _____/	No. CIV-S 92-1115 GEB-PAN INTERROGATORIES PROPOUNDED TO DEFENDANTS (No's 1-30)

The Plaintiffs, and each of them, request that Defendants STATE OF CALIFORNIA and GRAY DAVIS, CONTROLLER OF THE STATE OF CALIFORNIA, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories;

These interrogatories shall be deemed continuing in nature, so that if further, more complete, and supplemental answers shall be timely served if either the Defendants, their employees, agents or attorneys obtain further, more complete, or new information between the time of Defendant's answers and the time of trial.

Definitions

(A) "FLSA" and "the Act" refer to the Fair Labor Standards Act, (29 USC §§ 201, *et seq.*).

(B) "State officials" refers to appointed or elected State employees officially concerned with the *anticipated lack of a timely State budget or actual lack of a timely State budget* and/or issuance of registered warrants to some State employees during the period the State had no budget in July, 1992 through August, 1992. It does not refer to clerical employees or others engaged in routine repetitive functions such as processing warrants, or legislators or legislative staff.

(C) "Executive staff" refers to *State officials* at the level of Director (Controller), Deputy Director (Deputy Controller), Assistant Director, Assistant Deputy Director, and their immediate subordinates (those who report directly to them).

(D) "Timely State budget" refers to a State budget enacted by the deadline imposed by the California Constitution of July 1 for the fiscal year.

(E) "Registered warrants" refers to registered warrants issued pursuant to Government Code Section 17221.

(F) "The date the present lawsuit was filed" refers to July 10, 1992. The use of this date as a cut-off is intended to relieve Defendants of the obligation to disclose any information concerning the legal response to *this* lawsuit.

(G) "Time of compensation" refers to the timing of compensation, once the pay period has ended.

(H) "Manner of compensation" refers to the type of instrument used to pay wages.

(I) "Anticipated lack of a *timely State budget*" refers to the prospect that no *timely State budget* would be enacted, insofar as this prospect was anticipated before July 1, 1992, during the period the 1992/93 State budget was being formulated.

(J) "Actual lack of a *timely State budget*" refers to the period after July 1, 1992 until September 2, 1992, when there was no State budget in effect.

(K) "Effort to ascertain the provisions of the FLSA" refers to any attempt to learn or discover if or how the pertinent provisions of the FLSA or its implementing regulations applied to the State.

(L) "Effort to comply with the provisions" refers to any attempt to avoid possible liability for violation of *the Act*.

(M) "State compliance with the provisions of the FLSA" refers to avoidance of possible liability for violation of the FLSA.

(N) "Document" means any written or graphic material, however produced or reproduced. *Documents*

are to be taken as including all attachments, enclosures and other *documents* that are attached to, relate to, or refer to such *documents*.

(O) "Identify" (a) when referring to a person means to state the person's full name, present or last known address, present or last known telephone number, job title, and department, and (b) when referring to a *document* means to state the character thereof (i.e., letter, memo, etc.), as well as its subject matter, its date and full name and address of the person, firm, corporation, or other entity having possession, custody or control thereof.

Interrogatories

INTERROGATORY NO. 1.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with the Governor and/or the Governor's *executive staff* before *the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 2.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 3.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with the Controller and/or the Controller's *executive staff* before *the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 4.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 5.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with the Governor's legal staff (including attorneys from the Department of Personnel Administration and/or the Attorney General's Office and/or other departments) before *the date the present lawsuit was filed,* in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 6.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 7.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by Departmental *executive staff* with legislators and/or legislative staff *before the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 8.:

If you provided and affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 9.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with Legislative counsel before *the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 10.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 11.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with any Departmental *executive staff* before *the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 12.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 13.:

Please state whether the subject of *State compliance with the provisions of the FLSA* as to the *time of compensation* and *manner of compensation* was discussed by and/or with any *State officials* (other than any previously identified) before *the date the present lawsuit was filed*, in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July, 1992 through August, 1992.

INTERROGATORY NO. 14.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 15.:

Do you contend that the compensation of Plaintiffs by *registered warrants* in July, 1992 and August, 1992 for regular and overtime work complied with the regulation concerning the *manner of compensation* (i.e., cash or negotiable instrument payable at par) set forth at 29 CFR 531.27?

INTERROGATORY NO. 16.:

If your answer to the preceding interrogatory is in the affirmative, set forth the factual basis for your contention.

INTERROGATORY NO. 17.:

Do you contend that compensation of Plaintiffs by *registered warrants* in July, 1992 and August, 1992 during the period there was no *timely State budget* complied with the regulations concerning the time compensation is paid

for regular and/or overtime work, as set forth in 29 CFR 778.106 and/or 29 CFR 778.313?

INTERROGATORY NO. 18.:

If your answer to Interrogatory No. 17 is in the affirmative, please state the factual basis for each such contention.

INTERROGATORY NO. 19.:

Do you contend that compensation of Plaintiffs by *registered warrants* in July, 1992 and August, 1992 during the period there was no *timely State budget* complied with the declaratory judgment issued in the case *Biggs v. Wilson, et al.*, U.S. District Court – Eastern District of California, Case No. CIV-S-90-0942-WBS/TGH (a copy of which is attached hereto as APPENDIX A)?

INTERROGATORY NO. 20.:

If your answer to Interrogatory No. 19 is in the affirmative, please state the factual basis for each such contention.

INTERROGATORY NO. 21.:

Please state whether any written analysis, written research, or written opinion on the subject of *State compliance with the provisions of the FLSA* as to *time of compensation* and *manner of compensation* was ever read, reviewed, or relied upon by *State officials* (other than attorneys), in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* for fiscal year 1992/93

and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July 1992 through August, 1992.

INTERROGATORY NO. 22.:

If you provided an affirmative response to Interrogatory No. 21, please provide the following information:

(a) State the date(s) that each such analysis, research or opinion was conducted and/or prepared;

(b) As to each such date, *identify* the person or persons responsible for the preparation of any such written analysis, research or opinion;

(c) As to each such date, *identify* the person or persons who read, reviewed or relied upon any such written analysis, research or opinion in connection with the *anticipated lack of a timely State budget* or *actual lack of a timely State budget* and/or in connection with the issuance of *registered warrants;*

(d) As to each such date, *identify* each *document* which records or reflects such written analysis, research or opinion;

(e) As to each such date, describe any follow-up action or decision that followed the research, analysis, or opinion.

INTERROGATORY NO. 23.:

Do you contend that *State officials* acted in good faith and with reasonable grounds, such that liquidated damages should not be awarded under 29 USC 216(b), in issuing *registered warrants* as compensation for regular and overtime work to some State employees, including Plaintiffs, during the period there was no State budget in July, 1992 and August, 1992?

INTERROGATORY NO. 24.:

If your answer to Interrogatory No. 23 is in the affirmative, please describe the factual basis of this contention, including:

(a) The date of each *effort, if any, to ascertain and/or comply with the provisions of the FLSA* regarding the manner and *time of compensation* for regular and/or overtime work;

(b) As to each date identified in Subsection (a) above, *identify* the persons responsible for any *effort to ascertain and/or comply with the provisions of the FLSA* regarding the manner and time of compensation for regular and/or overtime work;

(c) As to each date identified in Subsection (a) above, describe any actions (including i.e., research, consultation with experts, implementation of special procedures for compensation) taken in connection with any *effort to ascertain and/or comply with the provisions of the FLSA* regarding the manner and *time of compensation* for regular and/or overtime work.

INTERROGATORY NO. 25.:

Please state whether *State officials* discussed the passage of SB-220 (attached hereto as APPENDIX "B").

INTERROGATORY NO. 26.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

INTERROGATORY NO. 27.:

Please state whether *State officials* received any information that State employees were experiencing delay in converting their *registered warrants* to cash in the period the State had no budget in July, 1992 through August, 1992 when there was no timely State budget.

INTERROGATORY NO. 28.:

If you provided an affirmative response to the preceding interrogatory, with respect to each date such information was received, please provide the following information:

(a) State each date such information was received and describe the information received on such date;

(b) As to each such date, *identify* each person who received such information and each person who gave the information;

(c) As to each such date, *identify* any *document* which reflects or records such information;

(d) As to each such date, describe any follow-up action or decision.

INTERROGATORY NO. 29.:

Did the State Controller and/or his *executive staff* discuss with the Governor and/or his *executive staff*, after *the date the present lawsuit was filed*, the subject of State compliance with the *FLSA* (29 USC § 216(b)) in connection with the *anticipated lack of a timely State budget or actual lack of a timely State budget* for fiscal year 1992/93 and/or in connection with the issuance of *registered warrants* as compensation to State employees in the period the State had no budget in July, 1992 through August, 1992.

INTERRROGATORY NO. 30.:

If you provided an affirmative response to the preceding interrogatory, with respect to each such discussion, please provide the following information:

(a) State the date each such discussion occurred;

(b) As to each such date, *identify* each person involved in such discussion;

(c) As to each such date, describe the topics covered in such discussion;

(d) As to each such date, *identify* any *documents* which were reviewed in connection with such discussion;

(e) As to each such date, describe any follow-up action or decision that resulted from such discussion.

Dated: 11/10/92

CARROLL, BURDICK &
McDONOUGH
Gary M. Messing, Esq.
Cathleen A. Williams, Esq.

By: /s/ Cathleen A. Williams
Cathleen A. Williams
Attorneys for Plaintiffs

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WILLIAM BIGGS; et al.,

Plaintiffs,

v.

PETE WILSON, Governor; KATHLEEN BROWN, Treasurer; GRAY DAVIS, Controller; A.A. PIERCE, Interim Director of the California Department of Transportation,

Defendants.

NO. CIV. S-90-0942-WBS/GGH

MEMORANDUM AND ORDER

(Filed Oct. 3, 1991)

This is an action to recover damages as well as declaratory and injunctive relief based on alleged violations of the Fair Labor Standards Act (FLSA). Jurisdiction is based on 28 U.S.C. § 1331.

Plaintiffs are highway maintenance workers employed by the State of California, Department of Transportation (hereinafter CalTrans). As a result of the 1990 budget impasse plaintiffs were not paid on the scheduled payday, July 16, 1990. The State withheld the checks contending, under state law, that payroll checks could not be released for the fiscal year until a budget was approved by the Legislature and signed by the Governor. On July 28, 1990, the Legislature passed the 1990 budged. Former Governor Deukmejian signed the budget

on July 16 payroll, totalling $5,620,313.41, on July 30 and 31, 1990.

Both sides have moved for summary judgment under Fed. R. Civ. P. 56. In order for the court to grant either party's motion there must exist no genuine issues of material fact and one of the parties must be entitled to judgment as a matter of law. *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

The first issue to be decided is whether the FLSA requires that wages be paid promptly when due. The FLSA expressly requires that an employer pay each employee, regardless of sex, a minimum wage set by the Act, 29 U.S.C. § 206, and overtime compensation for hours worked in excess of 40-hours per week, 29 U.S.C. § 207, and regulates the use of child labor. 29 U.S.C. § 212. Nowhere does it expressly require that wages be paid promptly or by a date certain. The question is whether such a requirement is implicit in the Act.

When circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed, courts should endeavor to give statutory language that meaning which nurtures the policies underlying the legislation. *United States v. Sisson*, 399 U.S. 267, 297-98 (1970). The legislative history of the FLSA shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945). A judicial pronouncement that there is no requirement that the worker be paid on time would leave the worker totally unprotected and

subject to the whims of the employer as to when wages would be paid. Such a result would be inconsistent with the objectives of the Act which include the elimination of labor conditions detrimental to the *maintenance* of a minimum standard of living necessary for the health, efficiency, and general well-being of employees. *Fleming v. Cudahy Packing Co.*, 41 F. Supp. 910 (S.D. Cal.1941).

Moreover, the liquidated damage clause of 29 U.S.C. § 216(b) "constitutes a Congressional recognition that the failure to pay the statutory minimum *on time* may be so detrimental to the *maintenance* of the minimum standard of living 'necessary for the health, efficiency and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay. . . . " *Brooklyn Savings Bank*, 324 U.S. at 707. [Emphasis added.][1]

Surprisingly, no cases have been brought to the court's attention which deal directly with the issue before the court.[2] Defendants argue that if Congress had

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[1] This case was decided before Congress amended the FLSA in 1947 to allow judges to exercise discretion in awarding liquidating damages. Thus much of the language speaks to the mandatory nature of liquidated damages under the Act. However the subsequent amendment of the Act does not affect the validity of these cases as support for the proposition that the FLSA contains an implied requirement of prompt payment.

[2] Plaintiff asserts that a similar issue was presented in *United States v. Klinghoffer Bros.*, 285 F.2d 487 (2d Cir. 1966). That case held that "[w]hile the FLSA does not expressly set forth a requirement of prompt payment, such a requirement is clearly established by the authorities, and codified in interpretative regulation, 29 C.F.R. 777.2(a) . . . " *Id.* at 491. However, the

intended and the Department of Labor had interpreted the FLSA to implicitly include a requirement of prompt payment, there would be no shortage of cases in this area. This absence of case authority, however, cannot be regarded as support for the contention that there is no such requirement implicit in the FLSA. Where the meaning of the statute cannot be determined convincingly from the statute itself, the stated policy of the Act, or its legislative history, the court must look to judicial pronouncements in cases which are not without pertinency. *Wirtz v. TiTi Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), *cert. denied*, 389 U.S. 834 (1967). Albeit in dicta, the courts have, on previous occasion, read into the Act a requirement of prompt payment. This court must give appropriate weight to those judicial pronouncements.

In *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 115, (1946)[3] the Supreme Court reaffirmed that "The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by [the] failure *to pay on time* must be made to accomplish Congressional purposes." (Quoting from *Brooklyn Savings Bank*, 324 U.S. at 708.) [Emphasis added].

Also, in *Atlantic Co. v. Broughton*, 146 F.2d 480, 481-482, (5th Cir. (1944),[4] the Fifth Circuit stated:

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regulation upon which that opinion is based does not appear in the Code of Federal Regulations, thus leading the court to conclude that it has been repealed.

[3] See footnote 1.

[4] See footnote 1.

> . . . if an employer *on any regular payment date fails to pay* the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee the difference between the wages paid and the wages due, plus an equal additional amount as liquidated damages . . . (emphasis added).

The *Schulte* Court was addressing, and condemning, compromises of real disputes over coverage under the FLSA which do not require the payment in full of unpaid wages and liquidated damages. However, the policy implications which are stated in the opinion are applicable in the instant case. The FLSA was intended to protect the worker whom Congress regarded as having unequal bargaining power. That protection must necessarily extend to the employee who is not paid his wages on the date due.

In requiring that employees be paid minimum wages, the FLSA surely must contemplate that those wages be paid promptly when due. Suppose that instead of being withheld for two weeks, the wages had been withheld for two months or even two years. During those months or years the employees would not receive the minimum wage – they would receive no wage at all. Clearly this is not what the Act contemplates. Therefore, in the absence of any authority to the contrary and in accord with the policy considerations which prompted Congress to enact the FLSA and the pronouncements of the Supreme Court, this court finds that the Act contains an implied requirement that wages be paid promptly when due.

The requirement of prompt payment should not be construed to impose strict liability on an employer for every delay in payment, however slight or for whatever reason. Indeed, such a result would threaten to bring about the financial ruin of many employers, seriously impair the capital resources of many others, provide a windfall to employees, and burden the court with excessive and needless litigation, all in direct contravention to the expressed intent of Congress. See 29 U.S.C. § 251(a)(1), (4) and (7). Instead, it must be interpreted to require payment which is reasonably prompt under the totality of the circumstances in the individual case. This interpretation is consistent with the long-established customs, practices, and contracts between employees and employers which Congress sought to revive in enacting the amendment to the statute. See *Id.* at § 251(a). For it has long been recognized that in the absence of a provision indicating that time is of the essence, a party is entitled reasonable time to perform. John D. Calamari & Joseph M. Perillo, *Contracts* § 11-22 at 410. (2nd ed. 1977).

Defendants do not argue that plaintiffs received their paychecks for the July 16 payroll promptly. Rather they argue that the FLSA contains no express or implied requirement of prompt payment and that issuance of plaintiffs' paychecks in the absence of a budget would have been illegal under their interpretation of state law. The record shows that the responsible state officials elected voluntarily and unnecessarily to withhold payment of plaintiffs' wages when due. In light of these circumstances, the court finds that the wages due to plaintiffs on July 16 were not paid with reasonable promptness as required by the FLSA.

The second issue to be decided is whether the requirement of the FLSA that wages be paid with reasonable promptness violates the tenth amendment or the state sovereignty doctrine when applied to the State of California. Defendants contend that plaintiffs did not receive their mid-month paychecks on the regularly-scheduled payday because warrants cannot be drawn on the state treasury and issued by the Controller until an appropriation has been made by the Legislature. *Stanson v. Mott*, 17 Cal.3d 206, 216 (1976). Plaintiffs counter that the state is authorized by its own statues [sic] to make payments for payroll purposes in the absence of a budget. The court does not reach this issue because irrespective of which interpretation of the state law is state law is correct, the lack of a budget does not overcome the operation of the supremacy clause of the United States Constitution, Art. VI, § 2. If this requirement of prompt payment under the FLSA is in conflict with California state law the FLSA must prevail.

A finding that prompt payment is implicit in the FLSA is not precluded by the tenth amendment or the doctrine of state sovereignty. *See, eg., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985). (" . . . we perceive nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision").

While conceding the applicability of *Garcia*, defendants contend that a different situation is presented in the instant case, in that if a requirement to pay employees immediately at the end of the pay period is read into the FLSA, the enforcement of such a requirement would be in

derogation of the state's constitutional and statutory provisions regarding the budget process. Defendants argue that a prompt payment requirement would interfere with state sovereignty with regard to a state's own internal operations, including matters of budgeting and personnel administration. However, "The Court in *Garcia* specifically reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'." *Bratt v. Los Angeles County*, 912 F.2d 1066, 1072 (9th Cir.), *cert. denied*, ___ U.S. ___ (1990) citing *Garcia*, 469 U.S. at 546-47. This court will not resurrect the line of reasoning laid to rest by *Garcia*.

Liquidated Damages

Section 216(b) of Title 29 U.S.C. provides that

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . .

Since plaintiffs have now been paid the wages, they seek to recover not the wages themselves but an additional equal amount as liquidated damages.

Section 260 of Title 29 U.S.C. provides that

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the

> satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

An employer has the burden of showing that the violation of the FLSA was in good faith and that the employer had reasonable grounds for believing that no violation took place. *Equal Employment Opportunity Comm'n v. First Citizens Bank*, 758 F.2d 397, 403 (9th Cir.), *cert. denied*, 474 U.S. 902 (1985).

The courts have interpreted § 260 as providing for a two part inquiry. *See Bratt v. Los Angeles County*, 912 F.2d at 1072. The first part is a subjective inquiry into the employer's good faith through an examination of whether it had "an honest intention to ascertain what [the FLSA] requires and to act accordingly". *Id.* The second is an objective test of whether the employer had reasonable grounds for believing that its conduct complies with the Act. *Id.* These are mixed questions of law and fact. *Id.* at 1071 *citing* 29 C.F.R. § 790.22(c) (1987).

Plaintiffs have chosen not to sue their employer, the State of California, in this action. Instead, they have sued only the Governor, the Treasurer, the Controller, and the Director of the Department of Transportation.[5] For this

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[5] By operation of F.R.Civ.P. 25(d) defendants Pete Wilson, Kathleen Brown, and A.A. Pierce Sels have been substituted for

reason alone plaintiffs' request for liquidated damages must be denied. Section 216(b) imposes liability for liquidated damages upon the employer who violates sections 206 or 207; it imposes no liability upon the officers of the employer.

Furthermore, defendants have produced evidence of the state's efforts to comply with FLSA including a signed declaration of Bruce N. Cain who in his professional capacity as an employee in the State of California's Department of Personnel Administration in the Policy Development Division attests to the state's extensive efforts to devise a policy which came within compliance of the Act. Those efforts reflect an honest intention to ascertain the requirements of the FLSA and to act accordingly. Moreover, the State had reasonable grounds for believing that its conduct complied with the Act because neither statutes, the applicable regulations nor the cases directly address the issue of prompt payment in the face of a state budget impasse. This case appears to be one of first impression. Therefore, in the exercise of its discretion the court would decline to award liquidated damages in this case.

In the absence of a liquidated damage award, prejudgment interest is necessary to fully compensate employees for the losses they have suffered, however. *Ford v. Alfare*, 785 F.2d 835, 842 (9th Cir. 1986). Plaintiffs are therefore entitled to interest on the amounts due them from July 16, 1990 to July 30 and 31, 1990.

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defendants George Deukmejian, Thomas Hayes, and Robert K. Best as Governor, Treasurer and Director of the California Department of Transportation respectively.

Injunctive Relief

The basis for injunctive relief in the federal courts is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982). Plaintiffs have been paid the amounts withheld due to the budget impasse. Therefore there is no immediacy of harm that would warrant injunctive relief. Neither is there evidence to indicate that any harm which might result from the failure to issue a permanent injunction could not be redressed by the legal remedies provided for in the FLSA. Accordingly, the court declines to grant plaintiffs' request for injunctive relief.

Declaratory Relief

Plaintiffs also seek a declaration that defendants' failure to issue pay checks promptly violates the FLSA, the United States Constitution, and the California Constitution. Declaratory relief is often an effective alternative to injunctive relief on a lesser showing. *Tierney v. Schwieker,* 718 F.2d 449, 457 (D.C. Cir. 1983). Faced with an analogous situation involving the refusal to release funds for the Aid to Families with Dependent Children program due to the same budget impasse, Judge Levi recently granted declaratory relief, pointing out that the dispute which occurred over the budget impasse is likely to recur. See *Pratt v. Wilson,* ___ F. Supp. ___, 1991 WL 130614 (E.D. Cal. 1991). The court concludes that similar relief is appropriate here. If and when the state should again find itself without a budget, the defendants and other responsible state officials are entitled to know their obligations

under the FLSA. Since the court finds that the failure to issue the checks promptly when due violates the FLSA, it is unnecessary to reach plaintiffs' contention that it violates the United States Constitution or the California Constitution.

IT IS THEREFORE DECLARED that defendants' failure to issue plaintiffs' paychecks promptly when due violates the Fair Labor Standards Act.

IT IS FURTHER ORDERED that plaintiffs' request for liquidated damages be, and the same is, hereby denied.

IT IS FURTHER ORDERED that plaintiffs' request for interest at the legal rate on the unpaid wages withheld from July 16, 1990 to July 30 and 31, 1990 is granted.

IT IS FURTHER ORDERED that plaintiffs' request for costs, including reasonable attorneys fees, is granted. Plaintiffs shall comply with the procedures set forth in Local Rules 292 and 293.

DATED: October 3, 1991

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

APPENDIX B

AMENDED IN ASSEMBLY JULY 14, 1992

SENATE BILL **No. 220**

Introduced by ~~Senator Bill Greene~~ *Senators Roberti and Maddy and Assembly Members Brown and Jones*

January 23, 1991

~~An act to amend Sections 3518, 3548, and 3590 of the Government Code, and to amend Section 65 of the Labor Code, relating to public employees.~~ *An act relating to the payment for services of state employees, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

SB 220, as amended, ~~B. Greene~~ *Roberti.* ~~Public employer/employee relations: mediation services~~ *State employees: payment for services.*

Existing decisional law may require prompt payment for specified state employees subject to the federal Fair Labor Standards Act for services rendered by these employees during the period from July 1 until the date that the Budget Act is enacted.

This bill would state legislative findings and declarations that, among other things, the application of the Fair Labor Standards Act to various classes and classifications of state employees is uncertain, and that the purpose of the bill is to eliminate the possibility of injunctive relief and liquidated

damages being awarded against the state under that act in the event employees, whether or not subject to the aforementioned court decision, are not paid as regularly scheduled.

The bill would appropriate from the General Fund and appropriate special funds to the Controller, and would authorize the Controller to expend, an amount no greater than is necessary to enable the Controller to compensate state employees for services rendered, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

~~(1) Existing law permits the Department of Industrial Relations to investigate and mediate labor disputes providing any bona fide party to the dispute requests intervention by the department and to proffer its services to both parties when work stoppage is threatened and neither party requests intervention.~~

~~This bill would require that the department be the sole agency of state government to provide mediators to mediate labor disputes.~~

~~(2) Under the Ralph G. Dills Act, the Governor or his or her representative is required to meet and confer with recognized state employee organizations on wages, hours, and other terms and conditions of employment.~~

~~Existing law provides that, if after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the~~

Public Employment Relations Board to appoint a mediator. If the board appoints the mediator, the costs of mediation are required to be paid by the board.

This bill would, instead, provide that if after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the board to contact the California State Mediation and Conciliation Service for appointment of a mediator.

(3) Existing law requires a public school employer, or its representative, to meet and negotiate with exclusive employee organization representatives, upon request, on wages, hours, and other terms and conditions of employment.

Existing law requires a higher education employer to meet and confer with exclusive employee organization representatives, upon request, concerning employment conditions.

Existing law permits, both with respect to public school and higher education employers, the employer or the exclusive employee organization representative to declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and to request the Public Employment Relations Board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.

~~Existing law requires the board, if it determines that an impasse exists, to appoint a mediator in accordance with any rules which it prescribes. In this event, mediation services are required to be provided by the board without cost to the parties.~~

~~This bill would, instead, permit the employer or employee organization representative to declare that an impasse has been reached between the parties in negotiations ever matters within the scope of representation and to request the board to arrange for the appointment of a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.~~

~~The board would be required, if it determines that an impasse exists, to refer the request to the California State Mediation and Conciliation Service.~~

~~(4) The bill would provide that mediation services provided for in the bill would be provided without cost to the parties but would eliminate the specific requirement that they be paid for by the board.~~

~~(5) The bill would specify that it would not prohibit the board from resolving disputes regarding representation matters and unfair representation practices charges that are filed with the board through settlement conferences.~~

Vote: ~~majority~~ 2/3. Appropriation: ~~no~~ *yes*. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

~~SECTION 1. Section 3518 of the Government Code~~ is

SECTION 1. The Legislature finds and declares all of the following:

(a) The decision by the federal district court in Biggs vs. Wilson (Civ. S-90-0942-WBS/GGH, October 3, 1991) currently may require prompt payment for services rendered by specified employees subject to the federal Fair Labor Standards Act (29 U.S.C.A. Sec. 201, et seq.). This decision is currently on appeal.

(b) The application of the Fair Labor Standards Act to the various classes and classifications of state employees is uncertain and is the subject of ongoing litigation. It is the purpose of this act to eliminate the possibility of injunctive relief and liquidated damages being awarded against the state under the Fair Labor Standards Act in the event these employees, whether or not subject to the decision, are not paid on their regularly scheduled pay day.

(c) The state faces an unprecedented fiscal crisis, and no Budget Act was enacted by July 1, 1992. Yet the state may be compelled by federal court order to expend monies, notwithstanding the absence of a state budget, for Medi-Cal, Aid to Families With Dependent Children, and In-Home Supportive Service workers. In the face of these federal court decisions, it would be inequitable to not enact legislation allowing payment of state employees.

(d) These federal court orders may substantially interfere with the ability of the state to manage its fiscal affairs in this time of crisis.

(e) Further the state does not wish to compromise in any manner any views with regard to the appropriate application of the Fair Labor Standards Act to state employees.

SEC. 2. There is hereby appropriated from the General Fund and any appropriate special fund to the Controller, and the Controller is authorized to expend, an amount no greater than that necessary to enable the Controller to compensate state employees for services rendered by those employees during the period from July 1, 1992, until the date that the Budget Act of 1992 is enacted.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Federal court decisions have created confusion concerning the compensation of certain classes of state employees that will result in unreasonable inequities. In order to remove the confusion surrounding the issue of what classes and classifications of state employees are entitled to receive compensation for their services before the Budget Act of 1992 is enacted, it is necessary for this act to take effect immediately.

All matter omitted in this version of the bill appears in the bill as introduced in the Senate, January 23, 1991 (J.R. 11).

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Sacramento, State of California, and not a party to the within-entitled action.

On November 10, 1992, I served a true copy of the document(s) named below:

INTERROGATORIES PROPOUNDED TO DEFENDANTS (No's 1-30)

_ by causing it to be personally delivered to the person(s) indicated below in the manner as provided in FRCivP 5(b):

X by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid addressed as follows:

Daniel E. Lungren, Attorney General (445-9555)
Larry G. Raskin, Deputy Attorney General (324-5501)
CALIFORNIA DEPARTMENT OF JUSTICE (fax-324-5205)
1515 K St., Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

Robert Shuman, Chief Counsel (445-6379)
Richard J. Chivaro, Esq. (445-6854)
OFFICE OF THE CONTROLLER
300 Capitol Mall, 18th Floor
Sacramento, CA 95814

Place of mailing: Sacramento, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on November 10, 1992, Sacramento, California.

/s/ Vicki Hepler
Vicki Hepler

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
Gerrit J. Buddingh', Esq.
CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION
3780 rosin Court, Suite 200
Sacramento, CA 95834
(916) 923-6060

Attorneys for Plaintiffs and Consenters

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA; et al.,

Defendants.

_____/

No. CIV-S 92-1115 GEB-PAN

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (No. 1)
[FRCP, Rule 34]

Production: 4/1/93

TO: Defendant STATE OF CALIFORNIA and its Attorneys Herein:

Plaintiffs hereby request that Defendant, by an officer or agent thereof, in accordance with Rule 34 of the Federal Rules of Civil Procedure, produce and permit Plaintiffs to inspect and to copy each of the following documents.

It is requested that the production be made on April 1, 1993, at 10:00 A.M., at CARROLL, BURDICK & MCDONOUGH, at 400 Capitol Mall, Suite 1400, Sacramento, California.

Definitions

(A) "FLSA" and "the Act" refer to the Fair Labor Standards Act, (29 USC §§ 201, *et seq.*).

(B) "State officials" refers to appointed or elected State employees officially concerned with the *anticipated lack of a timely State budget or actual lack of a timely state budget* and/or issuance of registered warrants to some State employees during the period the State had no budget in July, 1992 through August, 1992. It does not refer to clerical employees or others engaged in routine repetitive functions such as processing warrants, or legislators or legislative staff.

Documents to be Produced

1. Any and all memoranda, correspondence or documentation (including records of analysis, research or discussion) pertaining to the State Controller's request to the Governor for the issuance of a revenue reimbursement warrant (or "RAW") in or about May, 1992, and the Governor's response thereto, including any memoranda

referenced by Mr. Stancell in his deposition of August 28, 1992, at page 32 (attached hereto).

2. Any and all press releases or public statements issued by the Governor's office or his Communications Director concerning the 1992 budget between January, 1992 and September, 1992.

3. Any and all press releases or public statements concerning the issuance of the revenue reimbursement warrant ("RAW") in 1992 issued by the Governor's office or his Communications Director.

4. Any and all documentation of communications between the Governor, the Governor's office, or the Department of Finance and banks, financial institutions or their representatives concerning the acceptance or refusal of registered warrants.

5. Any and all documents which record communications from recipients of registered warrants concerning their ability to negotiate such warrants, including any logs or notes maintained in connection with telephone lines set up by the Controller.

6. Any and all memoranda which address the advisability and/or legality of issuing registered warrants, including any which address potential FLSA liability.

7. Any and all memoranda which discuss the requirements of the Fair Labor Standards Act ("FLSA") for the mode, manner or timing of payment of wages to State employees, which were prepared before September 3, 1992 or which were read, reviewed, or relied upon by State officials before September 3, 1992.

8. Any and all memoranda from appointing powers or State agencies concerning issuance or negotiation of registered warrants in 1992, including any which reference the use of revolving funds.

9. Any and all written opinion of the Controller's or Governor's legal staff concerning the issuance of registered warrants.

10. Any and all Moody's Investor's Service publications referring to California's issuance of registered warrants in 1992.

11. Any and all press releases or public statements by State officials concerning acceptance or rejection by financial institutions of registered warrants in 1992.

12. Any and all correspondence or memoranda concerning registered warrants from Richard Rosenberg, Chairman and Chief Executive Officer of Bank of America, and sent to State officials in 1992.

13. Any and all notes, memoranda, correspondence or documentation (including research, analysis or discussion) concerning legislative authorization to pay employee wages during the 1992 budget impasse.

Dated: 2/26/93

CARROLL, BURDICK & McDONOUGH
Gary M. Messing, Esq.
Cathleen A. Williams, Esq.

By: /s/ Cathleen Williams
Cathleen A. Williams
Attorneys for Plaintiffs

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Sacramento, State of California, and not a party to the within-entitled action.

On February 26, 1993, I served a true copy of the document(s) named below:

PLAINTIFFS REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (No. 1)

_ by causing it to be personally delivered to the person(s) indicated below in the manner as provided in FRCivP 5(b):

X by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid addressed as follows:

Christopher W. Waddell,
Chief Counsel (324-0512)
DEPARTMENT OF PERSONNEL ADMINISTRATION
1515 S St., North Bldg., Ste. 400
Sacramento, CA 95814-7243

Daniel E. Lungren,
Attorney General (445-9555)
Larry G. Raskin,
Deputy Attorney General (324-5501)
CALIFORNIA DEPARTMENT OF JUSTICE (fax 324-5205)
1515 K St., Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

Robert Shuman,
Chief Counsel (445-6379)
Richard J. Chivaro, Esq. (445-6854)
OFFICE OF THE
CONTROLLER (fax 322-1220)
300 Capitol Mall, 18th Floor
Sacramento, CA 95814

Place of mailing: Sacramento, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on February 26, 1993, Sacramento, California.

/s/ Vicki Hepler
Vicki Hepler

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
Gerrit J. Buddingh', Esq.
CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION
755 Riverpoint Dr., Ste. 200
West Sacramento, CA 95605-1634
(916) 923-6060

Attorneys for Plaintiffs and Consenters

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA; et al.,

Defendants.

_____/

No. CIV-S 92-1115 GEB-PAN

AMENDMENT FOR CORRECTION OF TYPOGRAPHICAL ERROR: REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (No. 1)

[FRCP, Rule 34]

Production: 4/1/93

TO: Defendant STATE OF CALIFORNIA and its Attorneys Herein:

Plaintiffs hereby amend Request No. 7 of their Request for Production of Documents (Set No. 1), as follows:

It is requested that the production be made on April 1, 1993, at 10:00 A.M., at CARROLL, BURDICK & MCDONOUGH, at 400 Capitol Mall, Suite 1400, Sacramento, California.

Definitions

(A) "FLSA" and "the Act" refer to the Fair Labor Standards Act, (29-USC §§ 201, *et seq.*).

(B) "State officials" refers to appointed or elected State employees officially concerned with the *anticipated lack of a timely State budget or actual lack of a timely state budget* and/or issuance of registered warrants to some State employees during the period the State had no budget in July, 1992 through August, 1992. It does not refer to clerical employees or others engaged in routine repetitive functions such as processing warrants, or legislators or legislative staff.

Documents to be Produced

* * *

7. Any and all memoranda which discuss the requirements of the Fair Labor Standards Act ("FLSA") for the mode, manner or timing of payment of wages to State employees, which were prepared before September

3, 1992 *AND* which were read, reviewed, or relied upon by State officials before September 3, 1992.

* * *

Dated: 3/9/93

CARROLL, BURDICK & McDONOUGH
Gary M. Messing, Esq.
Cathleen A. Williams, Esq.

By: /s/ Cathleen Williams
Cathleen A. Williams
Attorneys for Plaintiffs

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Sacramento, State of California, and not a party to the within-entitled action.

On March 9, 1993, I served a true copy of the document(s) named below:

AMENDMENT FOR CORRECTION OF TYPOGRAPHICAL ERROR: REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (No.1)

_ by causing it to be personally delivered to the person(s) indicated below in the manner as provided in FRCivP 5(b):

X by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid addressed as follows:

Christopher W. Waddell,
Chief Counsel (324-0512)
DEPARTMENT OF PERSONNEL
ADMINISTRATION
1515 S St., North Bldg., Ste. 400
Sacramento, CA 95814-7243

Daniel E. Lungren,
Attorney General (445-9555)
Larry G. Raskin,
Deputy Attorney General (324-5501)
CALIFORNIA DEPARTMENT
OF JUSTICE (fax 324-5205)
1515 K St., Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

Robert Shuman,
Chief Counsel (445-6379)
Richard J. Chivaro, Esq. (445-6854)
OFFICE OF THE
CONTROLLER (fax 322-1220)
300 Capitol Mall, 18th Floor
Sacramento, CA 95814

Roberta D. Perkins, Esq. (415/775-3900)
JOE R. McCRAY,
A LAW CORP. (fax 415/441-1683)
433 Turk St.
San Francisco, CA 94012

Place of mailing: Sacramento, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on March 9, 1993, Sacramento, California.

/s/ Vicki Hepler
Vicki Hepler

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
Gerrit J. Buddingh', Esq.
CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION
755 Riverpoint Dr., Suite 200
West Sacramento, CA 95605-1634
(916) 372-6060

JOE R. McCRAY, A Law Corporation
By ROBERT D. PERKINS (S.B. No. 153074)
433 Turk Street
San Francisco, CA 94012
(415) 775-3900

Attorneys for Plaintiffs/Consenters

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	No. CIV-S 92-1115 GEB-PAN No. CIV-S 92-1493 GEB-PAN No. CIV-S 92-1544 GEB-PAN

_____/

JAMES R. ADAMS, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
_____/

JOHNNY G. ADKINS, et al.,
Plaintiffs,
v.
STATE OF CALIFORNIA, et al.,
_____/

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (Set 2) [FRCP, Rule 34]

Production: 4/12/93

TO: Defendant STATE OF CALIFORNIA and its Attorneys Herein:

Plaintiffs hereby request that Defendant, by an officer or agent thereof, in accordance with Rule 34 of the Federal Rules of Civil Procedure, produce and permit Plaintiffs to inspect and to copy each of the following documents.

It is requested that the production be made on April 12, 1993, at 10:00 A.M., at CARROLL, BURDICK & MCDONOUGH, at 400 Capitol Mall, Suite 1400, Sacramento, California.

Definitions

(A) "FLSA" and "the Act" refer to the Fair Labor Standards Act, (29 USC §§ 201, *et seq.*).

(B) "State officials" refers to appointed or elected State employees officially concerned with the *anticipated*

lack of a timely State budget or actual lack of a timely State budget and/or issuance of registered warrants to some State employees during the period the State had no budget in July, 1992 through August, 1992. It does not refer to clerical employees or others engaged in routine repetitive functions such as processing warrants, or legislators or legislative staff.

Documents to be Produced

15. A copy or original of the letter written or sent on or about April 1, 1992 by Treasurer Kathleen Brown to Governor Wilson regarding a cash deficiency in the State budget, and any written document that reflects or records the Governor's response thereto, which is/are in the custody or control of the Office of the Governor of the State of California.

16. A copy of the original of the update from the Commission on State Finance issued on or about April 1, 1992 concerning the State's financial condition as of such date.

17. A copy or original of any and all calendars maintained by the Governor's Office which show appointments and/or meetings scheduled for the Governor during the months of July, 1992 and August, 1992.

Dated: 3/9/93 CARROLL, BURDICK & McDONOUGH
Gary M. Messing, Esq.
Cathleen A. Williams, Esq.

By: /s/ Cathleen A. Williams
Cathleen A. Williams
Attorneys for Plaintiffs

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Sacramento, State of California, and not a party to the within-entitled action.

On March 10, 1993, I served a true copy of the document(s) named below:

PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS FOR INSPECTION AND COPYING (SET 2)

_ by causing it to be personally delivered to the person(s) indicated below in the manner as provided in FRCivP 5(b):

X by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid addressed as follows:

Christopher W. Waddell,
Chief Counsel (324-0512)
DEPARTMENT OF PERSONNEL ADMINISTRATION
1515 S St., North Bldg., Ste. 400
Sacramento, CA 95814-7243

Daniel E. Lungren,
Attorney General (445-9555)
Larry G. Raskin,
Deputy Attorney General (324-5501)
CALIFORNIA DEPARTMENT OF JUSTICE (fax 324-5205)
1515 K St., Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

Robert Shuman, Chief Counsel (445-6379)
Richard J. Chivaro, Esq. (445-6854)
OFFICE OF THE
CONTROLLER (fax 322-1220)
300 Capitol Mall, 18th Floor
Sacramento, CA 95814

Roberta D. Perkins, Esq. (415/775-3900)
JOE R. McCRAY,
A LAW CORP. (fax 415/441-1683)
433 Turk St.
San Francisco, CA 94012

Place of mailing: Sacramento, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on March 10, 1993, Sacramento, California.

/s/ Vicki Hepler
Vicki Hepler

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, MICHAEL GUTER, GALEN McCRAY, GARY CLARK, BENNY RINCON, ART SMITH, RICHARD WALSH, ALFONSO CERVANTES, and LARRY CRABTREE, individually and on behalf of other persons similarly situated,	)	CIV-S-92-1115 GEB-PAN
Plaintiff,	)	CERTIFIED COPY
vs.	)	
STATE OF CALIFORNIA,	)	
Defendants.	)	

Deposition of

LaFENUS STANCELL

August 28, 1992

Reported by: Kathy Jo Kliewer, CSR# 4737

* * *

[p. 14] Q. Were you involved in discussions within the Department of Finance with regard to whether the four billion dollars request from the controller for revenue reimbursement warrants should be approved?

A. Yes.

Q. And can you tell me whether you attended meetings on that subject within the Department of Finance and the executive branch?

A. Yes.

Q. Can you give me the approximate date of the first such meeting?

A. No, I can't tell you. It was soon after we received a request, maybe within a day or couple of days.

Q. Okay. And were there policymakers other than yourself present at that meeting?

A. Yes.

Q. And who was present?

MR. RASKIN: I'm going to instruct the witness not to answer.

MS. WILLIAMS: Why is that?

MR. RASKIN: List of privileges: Executive, official information, confidential state secrets, deliberate process privilege.

MS. WILLIAMS: Oh. As to who was present at the meeting?

MR. RASKIN: Yes.

(Recess.)

Q. BY MS. WILLIAMS: Mr. Stancell, with respect to

* * *

[p. 35] A. Yes.

Q. What was your purpose in involving yourself in the enactment of that legislation?

MR. RASKIN: I'll object as vague and ambiguous.

Q. BY MS. WILLIAMS: Do you understand the question?

A. No.

Q. Well, what did you do with respect to the enactment of legislation to provide authorization for expenditures after June 30th of 1992 when there was no state budget?

A. I was part of a discussion to provide a recommendation to the governor as to whether he would be interested in requesting a bill of that nature for his signature.

Q. Okay. And did you make such a recommendation?

MR. RASKIN: I'm going to object to the question and instruct the witness not to answer.

MS. WILLIAMS: Okay. And Mr. Raskin, for purposes of the record, can we stipulate that upon your instruction that the witness not answer, that the formalities for bringing a motion to compel have been satisfied? Or do you want to mark the question and have it reread, that kind of thing?

Off the record.

(Discussion off the record.)

MS. WILLIAMS: Ms. Court Reporter, would you [p. 36] mark that question and reread it for the witness?

(Reporter complies.)

MS. WILLIAMS: And then you can just decline to answer, right?

MR. RASKIN: Off the record for a minute.

(Discussion off the record.)

MS. WILLIAMS: Mr. Raskin, could you put on the record what you just said?

MR. RASKIN: Right. Once I instruct the witness not to answer, since it's all on the record word for word, we can just go on to the next question.

MS. WILLIAMS: Okay.

Q. Were recommendations with regard to the enactment of legislation to provide authorization for expenditures after June 30th, '92 written down in any form?

MR. RASKIN: I'm going to object to the question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did your staff make recommendations to you with regard to the enactment of legislation to provide authorization for expenditures after June 1992?

A. Staff wasn't involved in a discussion.

Q. Okay. Did you discuss that recommendation regarding enactment of legislation to provide authorization for expenditure after June 30th, 1992 with legislators?

A. Yes.

* * *

[p. 38] today?

A. Briefly, yes.

Q. And can you tell me approximately when you first read the language?

A. Soon after the bill was introduced in the form that was finally enacted.

Q. Would that be between July 30th, I mean, June 30th and July 14th, 1992?

A. Whatever the date of – yeah. Yes.

Q. Now, in the language here on the front page in the first paragraph, it references the Fair Labor Standards Act. Do you see that there?

A. Yes, I do.

Q. Were you involved in discussions with regard to the requirements of a Fair Labor Standards Act relating to payment of wages by the state to its employees?

MR. RASKIN: I'm going to object and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject of the requirements of the FLSA for payment of wages to state employees with any subordinates in your department?

A. Probably did, but I don't recall precisely.

Q. Were any written memos generated on that subject?

MR. RASKIN: Object that the question – well, I'll let the witness answer that question.

THE WITNESS: Written memos between subordinate staff and myself?

* * *

[p. 41] Q. Was a written analysis of the bill done?

A. I believe so.

Q. Is that published anywhere?

A. When you say "published," it's a written document, yes.

Q. Is that provided to the legislature?

A. Yes.

Q. Okay. Now, did you discuss the requirements of the Fair Labor Standards Act with respect to payment of wages in the absence of the state budget with persons who were at your rank in the Department of Finance or in other departments?

MR. RASKIN: I'm going to object that the question's vague and ambiguous as to the time of the discussion.

Q. BY MS. WILLIAMS: Well, in the time period that you were discussing the bill to authorize expenditures in the absence of a state budget in 1992, did you discuss the requirements of the Fair Labor Standards Act for the payment of wages to state employees with persons of your rank; in other words, your equals within the Department of Finance or in other departments of state government?

MR. RASKIN: I'm going to object that the question is vague and ambiguous as to time still.

Q. BY MS. WILLIAMS: Well, what was the period of time that the discussions concerning the enactment of the bill to provide authorization for expenditure for wages [p. 42] during the period in 1992 when there was no budget occur?

A. It happened between the first of July and the 14th of July.

Q. Okay.

A. Probably.

Q. And in that time period did you discuss the subject of the requirements of the FLSA for the payment of wages with persons at your rank in state service?

MR. RASKIN: I'm going to instruct the witness not to answer that question.

Q. BY MS. WILLIAMS: Okay. Keeping in mind the subjects that I've just referenced, i.e., the requirements of the Fair Labor Standards Act for the payment of wages to state employees during the period that there was no budget, did you discuss that subject with the governor?

MR. RASKIN: I object to that question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject with the governor's staff?

MR. RASKIN: I'll object to the question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject with employees in state government outside the executive branch?

A. No.

Q. Did you discuss it with the state controller or his staff?

[p. 43] A. No.

Q. Did you discuss it with any outside consultants?

A. No.

Q. Did you discuss it with any attorneys?

MR. RASKIN: Object to the question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Okay. In the time period after the deadline for enacting a budget had passed, i.e., June 15th, 1992, to your knowledge were any attorneys assigned to research the issue of FLSA requirements with respect to the payment of wages to state employees?

MR. RASKIN: Object to the question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you receive any advice from attorneys on that general subject of FLSA requirements for the payment of wages to state employees between June 15th and July 14th, 1992?

MR. RASKIN: Counsel, I'm going to object to the question and instruct the witness not to answer. Frankly, for the record, I'm surprised that you're asking questions about advice that Mr. Stancell received from

attorneys. You know full well that government agencies retain all the privileges of attorney client, so even asking about it is basically patent and ridiculous.

MS. WILLIAMS: Well, it's my understanding of the attorney client privilege that I'm not impinging on [p. 44] that privilege by asking subject matter or identity of people involved, as long as I don't inquire into the specifics or the advice that was given. So I have a different picture of the scope.

Q. Now, with respect to legislators or legislative staff, you've mentioned one legislator you spoke to about the bill to authorize expenditures in the interim when there was no state budget for wages. Other than that one legislator, did you discuss it with any other legislators?

A. No, I didn't.

Q. Do you know if persons in the Department of Finance were carrying out discussions of the subject with legislators?

A. No, I don't know.

Q. Other than yourself, Mr. Class and Mr. Horlick –

A. Ordike.

Q. Oh, Ordike. I'm sorry.

– were there others in the Department of Finance who were involved in the enactment of legislation to provide authorization for expenditure for wages during the period when there was no state budget?

A. Yes.

Q. And you are the others who were involved?

A. The Director and the Deputy Director, whose responsibility is for legislation for the Department of Finance.

[p. 45] Q. And who is the Deputy Director?

A. Steve Olson.

Q. And anyone else?

A. I said the Director.

Q. And what is the Director's name?

A. Thomas Hayes.

Q. Now, in your presence has anyone in your subordinate staff expressed an opinion as to whether the state ran the risk of violating the FLSA by not issuing regular warrants to employees as wages?

MR. RASKIN: I object to the question and instruct the witness not to answer.

MS. WILLIAMS: What's the basis of that objection?

MR. RASKIN: That you're asking about discussions about ongoing litigation.

Q. BY MS. WILLIAMS: Well, apart from any ongoing litigation, did any of your staff express any opinion as to whether the state was running the risk of violating the FLSA by not paying employees wages through the issuance of registered warrants?

MR. RASKIN: Counsel, that's essentially the same question that you were just asking him.

MS. WILLIAMS: Right.

MR. RASKIN: Same privileges as being you can't put it aside. It's happening. It's the case. It can't be put aside. There is ongoing litigation pertaining to that particular subject. So to ignore [p. 46] reality is to ask that same question.

MS. WILLIAMS: Well, I don't know.

MR. RASKIN: I'm instructing the witness not to answer.

MS. WILLIAMS: Okay. You're instructing the witness not to answer that question?

MR. RASKIN: Right.

Q. BY MS. WILLIAMS: Okay. Now, can you tell us, Mr. Stancell, whether – well, strike that.

With respect to Exhibit 1, this bill was enacted; is that right?

A. That's correct.

Q. And I'm going to refer to it as SB 220. Did SB 220 result in the issuance of registered warrants to general fund employees after the date it was enacted?

A. In some cases it did.

Q. And what cases are those?

A. I believe it was in the case of the assembly staff of the assembly getting a regular warrant under those circumstances. And I believe it was in the case of those employees who were funded through special funds receiving a regular warrant. But other than that, I believe all others were in receipt of a registered warrant.

Q. And what distinction was there made with respect to who would get a regular warrant and who would get a registered warrant after the enactment of SB 220?

A. That was something that was more in the purview

* * *

[p. 54] did you discuss or did you discuss with your staff whether the issuance of registered warrants would violate the constitutional ban, as you've described it, on deficit funding?

A. No.

Q. Did the Department of Finance have a position on that question?

A. No.

Q. Is a registered warrant a form of external – what you've described as external borrowing by the state?

A. I don't know if it meets that same definition. I do know that there are provisions allowed for its statute to use the registered warrant for meeting the state obligations when there is not sufficient cash available to do so.

MR. RASKIN: Actually, I'm going to object to that question as calling for a legal conclusion.

MS. WILLIAMS: Okay. Actually, I'm just inquiring into the application of these statutes.

Q. Was any research or study done within the Department of Finance about the issuance of registered warrants as a form of indebtedness?

MR. RASKIN: Object to the question, instruct the witness not to answer.

MS. WILLIAMS: What's the nature of that objection?

MR. RASKIN: Oh, attorney client, work product.

[p. 55] Q. BY MS. WILLIAMS: Well, other than attorneys, was any research done by your staff into the question of whether registered warrants were a form of indebtedness that was permissible?

A. No.

Q. Did any of your staff discuss whether the issuance of registered warrants could expose the state to liability for nonpayment of wages under the Fair labor Standards Act?

MR. RASKIN: I'm going to object to the question and instruct the witness not to answer.

MS. WILLIAMS: What's the nature of that objection?

MR. RASKIN: Oh, deliberate process privilege, attorney-client, attorney-work product privilege and ongoing litigation.

Q. BY MS. WILLIAMS: Okay. Well, with respect to that same inquiry, did you discuss that subject with your staff on any occasion when an attorney was not present?

MR. RASKIN: I'm going to object to that question and instruct the witness not to answer.

MS. WILLIAMS: Okay. And what's the nature of that objection?

MR. RASKIN: All the objections I raised to the previous questions.

MS. WILLIAMS: Okay.

MR. RASKIN: As well as the deliberate process privilege. It was not a general waiver as to all [p. 56] discussions to subordinate staff.

Q. BY MS. WILLIAMS: Well, focusing on subordinate staff, was there any research into the question of whether the issuance of registered warrants would expose the state to liability under the FLSA for nonpayment of wages?

MR. RASKIN: Object to the question and instruct the witness not to answer.

MS. WILLIAMS: Well, that's just with respect to subordinate staff.

MR. RASKIN: That's true. But many of those same privileges – first I said it was not a general waiver, all discussions with subordinate staff. But many of these privileges that I've raised I think a few questions back apply, whether it's subordinate staff or up.

Q. BY MS. WILLIAMS: Did you discuss the issue of whether issuance of registered warrants would expose the state to liability under the FLSA for nonpayment of wages with any superiors within your department?

MR. RASKIN: Object to that question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss the issue of whether the issuance of registered warrants would expose the state to possible liability under the FLSA for nonpayment of wages with the governor or the governor's staff?

MR. RASKIN: Object to that question and [p. 57] instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss the issue of whether the use of registered warrants would expose the state to FLSA liability with any employees outside the executive branch, any state employee?

A. When you say outside of the executive branch, what do you define as the executive branch?

Q. That would include the legislature.

A. The answer is no.

Q. Okay. The state controller?

A. I did.

Q. You did?

A. Once.

Q. And who did you discuss that with with respect to the state controller?

A. The state controller in the person of Arnold Schuler raised the issue with me.

Q. And what did he say?

MR. RASKIN: Object to that question and instruct the witness not to answer.

MS. WILLIAMS: Okay. And what's the nature of that objection?

MR. RASKIN: Deliberate process privilege, executive privilege, official information privilege, confidential state secretes, ongoing litigation.

MS. WILLIAMS: Is it the state's position that any discussions about possible FLSA liability for nonpayment of wages in the interim period when there was [p. 58] no budget is privileged?

MR. RASKIN: If you're going to present that to me in the generic sense, basically yes. But I'll leave it at that.

Q. BY MS. WILLIAMS: Now, I've asked you want Mr. Schuler said to you. And there has been an objection to that. Can you tell me what you said to him in that discussion?

MR. RASKIN: Object to the question and instruct the witness not to answer.

MS. WILLIAMS: And what's the basis of that objection?

MR. RASKIN: All the objections that I've raised to previous questions.

Q. BY MS. WILLIAMS: Now, did you discuss the issue of FLSA liability as a result of the issuance of registered warrants to state employees with any attorneys?

MR. RASKIN: Object to that question and instruct the witness not to answer.

MS. WILLIAMS: And what's the basis of that objection?

MR. RASKIN: Oh, attorney client privilege, attorney work product, deliberate process privilege, ongoing litigation.

MS. WILLIAMS: Okay.

MR. MESSING: Could we have a moment off the record?

* * *

[p. 72] provide employees who are experiencing problems in redeeming registered warrants for overtime and permanent intermittent pay with revolving fund checks for that purpose?

A. That's correct. I did tell him that.

Q. And what was your rationale?

A. Number one, the use of revolving funds was agreed to for the period ending or the pay period ending July 30th. And it was my understanding when we were discussing the use of revolving funds that it was to be limited to certain circumstances where employees, because of their location in the state, would be somehow disadvantaged because banks would not be willing to accept their registered warrants. It was my impression, based on the conversation I had with the state controller, that that would be a very, very small group of, small number of occurrences. And based on that, I agreed to the use of revolving funds for acceptance of the registered warrants and issuance of the net pay and allowing accounting offices then to redeem or at least to cash the

registered warrant with the bank, who at the time was still accepting them unconditionally.

Q. Now, that's something that you refer to in your next memo, or in the next memo, which is Exhibit 6?

A. Uh-hum.

Q. Is that right?

A. Right.

Q. Okay. And is this an electronic memo that you [p. 73] sent to Mr. Schuler?

A. Yes. This is a reply to his note.

Q. Okay. And it says here, "I agreed to allow the use for July 30th only because the banks were still accepting them unconditionally." How did the unconditional acceptance of the banks of the registered warrants enter into your decision to authorize departments to exchange registered warrants for cash out of their revolving funds?

MR. RASKIN: What exhibit were you referring to, counsel?

MS. WILLIAMS: Number 6.

MR. RASKIN: Is it supposed to say something about banks accepting them?

MS. WILLIAMS: Off the the record.

MR. RASKIN: Okay.

(Discussion off the record.)

(Reporter read back the last question.)

THE WITNESS: That influenced my decision because the departments could –

MR. RASKIN: Actually, I'm going to ask we just take a break for a moment.

(Break).

Q. BY MS. WILLIAMS: Mr. Schuler, you were in the middle of an answer. Do you want to have that reread, what you had said so far?

A. Mr. who?

Q. I'm sorry. Mr. Stancell.

[p. 74] A. Please.

(The reporter read back the last question.)

MR. RASKIN: I'm going to object and instruct the witness not to answer.

MS. WILLIAMS: On what basis?

MR. RASKIN: Executive privilege, deliberate process privilege. Those two privileges.

Q. BY MS. WILLIAMS: Okay. What information Mr. Stancell, had you received at or before the time that you electronically communicated Exhibit 6 about the acceptance of registered warrants by banks?

A. I believe there was an announcement by the banks that had been accepting them prior to that that they would no longer do so.

Q. Where did you hear that announcement?

A. Either read it in the paper or someone told me in the office that they had become aware of that.

Q. Okay. Now, did you or your staff look into further the issuance of acceptance of registered warrants by banks in this time period, which is basically the first week of August?

A. No.

Q. Now, you had said that initially you agreed to allow employees to present their registered warrants to their departments for the July 30th payroll because you were under the impression that the number of employees who would do so or the number of times that would occur was a small number. In the time period after July 30th

* * *

[p. 79] Finance was as it related to any payroll or registered warrants issued after July 30th.

Q. BY MS. WILLIAMS: Okay. With respect to the original decision to authorize the use of the revolving funds for the July 30th payroll where employees were unable to cash their registered warrants, was that discussed by you with any policymakers?

MR. RASKIN: I'm going to object to the question and instruct the witness not to answer.

MS. WILLIAMS: And what's the basis?

MR. RASKIN: Executive privilege, official information, confidentiality, deliberate process privilege.

Q. BY MS. WILLIAMS: Did you receive any instruction from any policymaker with respect to the decision to authorize the use of the revolving funds for

the July 30th payroll under the circumstances we've discussed, or did you make that decision on your own?

MR. RASKIN: Object to the question and instruct the witness not to answer.

MS. WILLIAMS: And what's the basis?

MR. RASKIN: All the objections I just raised.

Q. BY MS. WILLIAMS: Were the use of revolving funds – strike that. Withdraw that.

With respect to the original decision to allow the revolving funds to be used as a source for redemption of registered warrants for the July 30th payroll, did you consider the provisions of the Fair Labor Standards Act [p. 80] that require that employees be paid?

MR. RASKIN: Object to that question and instruct the witness not to answer.

MS. WILLIAMS: And what's the basis?

MR. RASKIN: Based on all the privileges I asserted I think two questions ago, as well as ongoing litigation issue, as well as attorney client privilege.

Q. BY MS. WILLIAMS: Well, with respect to the use of the revolving funds as a source for redemption of warrants under limited circumstances in July of '92, did you consult an attorney on that subject matter?

MR. RASKIN: I'm going to object to that question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject matter with the governor or his staff?

MR. RASKIN: I'm going to object and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject matter with any representatives or agencies or departments?

MR. RASKIN: Object to the question and instruct the witness not to answer.

Q. BY MS. WILLIAMS: Did you discuss that subject matter with any legislators or legislative staff?

A. No.

Q. Now, with respect to departments, such as the Department of Corrections, is the revolving fund an account that is maintained for the whole department or

* * *

(SEAL)
DANIEL E. LUNGREN
Attorney General
State of California
DEPARTMENT OF JUSTICE

1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

Facsimile: (916) 324-2560
(916) 324-5501

March 31, 1993

Cathleen Williams, Esq.
Carroll, Burdick & McDonough
400 Capitol Mall, Suite 1400
Sacramento, California 95814

RE: Parr v. State of California, et al. U.S. District Court Case No. CIV-S 92-1115 GEB-PAN

Dear Ms. Williams:

Pursuant to our discussion on Thursday, March 24, when we met to resolve the Plaintiff's Motion to Compel ("Plaintffs' Motion"), tills office proposes the following approach as a means of resolving the issues raised in Plaintiffs' Motion.

First, rather than focus on one set of interrogatories and a series of questions from one deposition in isolation, this office believes that it would be more productive to look beyond the one or two requests for discovery and focus on the overall discovery necessary to be taken in this case. That way, the specific discovery at issue can be seen in its proper context, rather than in a vacuum.

To that end, this office is going to deal directly now with a number of substantive issues, so that the State's overall position in the litigation, and the subsequent discovery that would necessarily follow, will be clear.

I. Background

There should be no dispute that the burden is now on the State to show that it had a good faith belief that payment of state employees' salaries in registered warrants did not violate the FLSA, and that it had reasonable grounds to believe that its conduct complied with the FLSA. In fact, aside from statements made by Mr. Messing in open court on this point, the Court's March 3, 1993 Order itself highlights this point, in stating that the next phase of this case "shall focus" on "[w]hether the State acted in bad faith and without reasonable grounds for its belief that issuance of registered warrants complied with the FLSA's manner of payment requirement."

The Plaintiffs' Motion is basically premised on the concept that once the State asserts that it acted in good faith, there is an automatic waiver of *every* privilege the State has, from the attorney-client to the deliberative process privilege – involving the Governor himself – and that every decision made by the State can then be put under a microscope for examination. What automatically follows from the Plaintiffs' position is that the Plaintiffs can *compel* disclosure of any information and/or compel waiver of privileges that they want, as long as it is peripherally relevant to the litigation.

Rather than a wholesale, automatic waiver of every privilege the State has, this office believes that since the

burden is on the State to present its case to show good faith, it is not a question of whether the State can be compelled to automatically waive all of its privileges, but to what extent is the State willing to *voluntarily waive* certain privileges in order to meet its burden that it acted in good faith.

In that context, it becomes obvious that until the Plaintiffs know what case the State intends to put on to show its good faith, the Plaintiffs can not focus their discovery, and may unintentionally spread too far a net, intrusively invading privileges unnecessarily, involving matters which go well beyond the case the State was going to put on to show its good faith.

Thus, the focus now should not be why did the State issue registered warrants, since the Court has already ruled that registered warrants violated the FLSA, but whether the State fulfilled its obligations under the FLSA, under the subjective and objective tests. Again, the Court's March 3, 1993 Order explicitly incorporates that premise in outlining what the next phase of discovery "shall" be.

The problem with the interrogatories and the questions posed to Stan Stancell in his deposition that Plaintiffs contend in Plaintiff's Motion should be answered, is that Plaintiffs immediately seek information from the very top levels of government, intrusively invading a wide array of sensitive privileges, from the attorney-client privilege to the deliberative process privilege – involving communications with the Governor himself – without knowing what is the extent of the State's case concerning its good faith.

Plaintiffs aren't to be faulted for conducting aggressive discovery; but, in light of the burden on the State to put on its case showing it acted in good faith, and the fact that Plaintiffs may be seeking privileged information at the *outset* of their discovery which may go way beyond the case the State intends to put on, a more strategic and less intrusive approach may be desirable in this case, where both Plaintiffs and the State are ultimately placed in a "win-win" situation.

III. Suggested Solution

This office proposes an approach in which both the State and the Plaintiffs are placed in a position where their respective interests are satisfied.

Assuming Plaintiffs' interest is not just to obtain unlimited information through an unlimited fishing expedition through an unrestricted (and unnecessary) invasion of every privilege the State has, in which case no amount of compromise or discussion will ever satisfy the Plaintiffs, the State proposes to lay out an outline of its general case *now* to Plaintiffs, so that Plaintiffs can more accurately tailor their discovery at the outset concerning the case the State intends to put on at trial. The State will also provide an initial list of witnesses and their titles, who will also be available (upon arranging mutually agreeable dates) for depositions.

The advantage to the Plaintiffs should be obvious: the Plaintiffs are provided with a description of the State's general case now, at the outset of discovery, in writing, which binds the State at trial. Further, the result is that the State is generally *limiting itself* now to the

outline it is providing, which means the State will not go beyond at trial what it is generally presenting now of its good faith defense.

Along with learning now, directly, what is the State's case, which the State is willing to limit itself generally, at trial, Plaintiffs get to focus their discovery on what is relevant – the State's layout of its good faith defense – and do not have to waste time or resources on other indirect, unrelated matters not part of the State's case.

The result is that not only is the State limiting itself at trial as to what will be included in its case, but the State is binding itself not to put on evidence at trial not ultimately disclosed as part of its case, *and* not to putting on witnesses which the State has not ultimately made available for deposition.

As part of this proposal, the State is willing to partially waive the attorney-client and attorney work-product privilege, to the extent it is part of the States' case, by producing the legal analysis done by the Department of Personnel Administration and by the Controller's office.

The result is that Plaintiff's Motion is at this time "not ripe for adjudication", since there is no reason at this time for Plaintiff's to proceed to obtain the information they now seek: by seeking to learn about conversations, etc. involving the Governor, for example, Plaintiffs are essentially going too high, too fast, and well beyond the State's case-in-chief.

In light of the peculiarities of this case, i.e., the burden on the State to put on its case showing good faith,

and the sensitive privileges of the governmental process which fall-outside State's case-in-chief, the State proposes that the percipient witnesses listed be deposed, and Plaintiffs may be satisfied with the information obtained at that level. The State proposes to either put Plaintiffs' Motion "on hold" for sixty days, i.e., reschedule it now, on a date certain, or, reserve a series of dates with the Court for this matter on which Plaintiffs' Motion may still be heard, maybe on ten days notice to the State. Then, if the Plaintiffs still are not satisfied with the information they have obtained, they can still proceed with Plaintiffs' Motion without really having lost any time due to scheduling problems with the Court.

Furthermore, the State is willing to make the *same witnesses* available to be re-deposed, on a "rebuttal" basis, if the States' approach to a "staged process" of discovery is first tried, and Plaintiffs subsequently pursue Plaintiffs' Motion and prevail on the issues contained in Plaintiffs' Motion.

The result is that as part of this "staged" process of discovery, i.e., starting with the percipient witnesses to the State's case, and only going to higher levels of government officials as the need dictates, both the State and the Plaintiffs "win". The State "wins" because matters it contends are not part of its case are not unnecessarily intruded upon. The State also benefits because if Plaintiffs still pursue Plaintiffs' Motion at a later date, the State can point to all the information it has disclosed which makes up its case which it is limiting itself at trial, and believes such information should help it in defending Plaintiffs' Motion.

On the other hand, the Plaintiffs' "win" with this approach because not only do they get the State's case now and access now to the people and information underlying the State's general case, which the State is limiting itself to at trial, but if Plaintiffs decide they must ultimately pursue Plaintiffs' Motion, Plaintiffs can point to their good faith approach efforts to cooperate with the State in discovery, and document why they *still* need access to what is now being sought in Plaintiffs' Motion.

By trying this approach, either the relevant information satisfactory to the parties will be provided, without the necessity of fighting (unnecessarily) now over Plaintiffs' Motion, or, each side win have strengthened their respective positions concerning Plaintiffs' Motion, and the matter will truly be "ripe for adjudication". It is not now.

Please find the States' general description of its "case-in-chief" and its list of initial witnesses, on the attached statement. While the States' description is actually fairly extensive, it should be viewed as a general layout of the State's case, which does not foreclose the State exactly word-for-word to only what is contained within the four corners of the document; e.g. if there was an additional action taken but not listed to assure negotiability of registered warrants.

I hope this clearly sets out the State's suggested approach. If you have any questions, please do not hesitate to contact me. I also hope that when the time comes,

the plaintiffs will reciprocate and be forthcoming with their case as the State is now.

Sincerely,

DANIEL E. LUNGREN
Attorney General

/s/ Larry Raskin
LARRY G. RASKIN
Deputy Attorney General

LGR:pl

Attachments

STATE'S DESCRIPTION OF ITS CASE

The State's case really is quite simple and straightforward:

First, as described by Carla Lenerd, both in her deposition and in her declaration submitted in opposition to Plaintiffs' Motion for January Judgment, starting around January, 1992, the State began to face an unprecedented cash-flow crisis, due to the reasons outlined in the Lenerd Declaration.

Pursuant to state law, when there is inadequate cash in the General Fund to pay the State's obligations, the Controller must issue registered warrants. California law also prioritizes which obligations have precedence, to be paid first, i.e., payment for support of the public school

system and public institutions of higher education, payments for principal, interest on state bonded indebtedness, and repayment to special funds as required for funds borrowed. All other obligations have equal claim against unapplied cash in the General Fund. Payment to state employees is not one of the listed priorities under California law.

The California Supreme Court had previously upheld the use and legality of registered warrants, and in fact there was an approximate two year track record of registered warrants being successfully negotiated, the one time registered warrants were issued by the State for an extended period. In addition, a recent opinion by the State Attorney General's office concluded that registered warrants were legal, negotiable instruments. Furthermore, no federal law prohibited the use or issuance of registered warrants. In fact, after discussions with state officials, the specific federal agencies responsible for regulating the banking and financial community expressly authorized the banking and financial community to accept registered warrants in 1992.

While the FLSA requires prompt payment to employees of cash or its equivalent, negotiable at par, the statute, the regulations and case law do not specifically define exactly what the terms "cash or its equivalent" or "negotiable at par" or "prompt payment" means; nor do they expressly prohibit registered warrants issued by a state, nor do they hold that payment in registered warrants violates the prompt payment requirement. In any case, when the issue of payment to state employees arose, in light of the shortfall of the General Fund, both the legal counsel to the Controller's office and the legal counsel to

the Department of Personnel Administration ("DPA") prepared a written, legal analysis of payment to employees in light of *Biggs v. Deukmejian* (the "Biggs case"), the FLSA case requiring "prompt payment" to state employees, when no budget was in effect. Both the Controller's legal counsel and DPA's Chief Counsel reviewed the scant case law defining the ambiguous terms governing this case, and other legal authorities, and concluded that payment to state employees with registered warrants would not violate the FLSA, as long as registered warrants were negotiable at face value.

Thus, in light of this case literally being a case of first impression – since *Biggs* only involved the situation where there was a lack of a budget appropriation, versus the situation here where there was no budget and no cash available – combined with the scant federal authorities defining the "cash or its equivalent" requirement, the Controller's and DPA's attorneys concluded that there was nothing in federal law which prohibited payment to state employees with registered warrants, and no authority which on its face found California's constitutionally and/or statutory mandated priorities of payment by the State to be unlawful. Once there was insufficient funds in the General Fund to pay its obligations, as prioritized by the California Constitution and/or statutes, California law required the issuance of registered warrants, and no federal law expressly contradicted and/or prohibited that scenario. Furthermore, the California Constitution compelled the State's administrative officers to execute state law, absent a court decision superseding California law.

As to looking at "alternatives" to issuing registered warrants, such as the issuance of a Four Billion Dollar

Reimbursement Warrant ("RAW") as suggested by the Controller in April, 1992, that matter is not relevant to the State's case (or the Plaintiffs' case), for a number of reasons.

First, the Governor's letter explicitly details as a matter of public record why such a request was denied and why approval in the amount ultimately decided was appropriate. That is the State's defined, explicit position.

Second, since the legal opinions provided by DPA and the Controller's office affirmed the use of registered warrants for payment of state employees, the sizing of the RAW becomes absolutely irrelevant, since as far as the State was concerned, registered warrants were a legitimate, appropriate, authorized method to pay state employees. It is important to note that the State's action – payment of registered warrants to state employees – *conformed* to the legal opinions issued by the Controller's office and DPA, and did not fly in the face of said legal advice. Thus, assuming the RAW approved by the Governor was "undersized" – assuming that could even be defined – it did not matter because the State's legal analysis upheld the use of registered warrants as a legal means of paying its employees.

Finally, it was not obvious in April, 1992 that a budget would not be "timely passed" by the Legislature. Along those same lines of looking at "alternatives", conceivably, *every* decision by the State which involved expenditure of funds could then be a focus of inquiry if Plaintiffs are given the right to challenge, in retrospect, the sizing, of the RAW. Other avenues of inquiry could just as easily be why prisons weren't closed as a means to

save money, why weren't welfare reductions implemented, why wasn't more money borrowed, why weren't more taxes imposed, why weren't the courts closed instead, etc., etc., etc., none of which relates to the *State's good faith case* as defined by the Court's March 3, 1993 Order: "Whether the State acted in bad faith and without reasonable grounds for its belief that issuance of registered warrants complied with the FLSA's manner of payment requirement".

It is important to note that while there have been several "late" budgets over the years, only one time previously, in the summer of 1990, was the budget so late that it affected the payment of state employees' salaries. And then, that was just an appropriation question, not the scenario here of no appropriation combined with no available cash. Thus, other than that one-time event in 1990 where a budget was so late that it affected the payment of state employees' salaries, there was no reason to presume in April, 1992, when the sizing of the RAW was first initiated, that such a scenario would necessarily occur again. A "late budget" which affects payment of state employees would be approximately July 15.

So, on or about July 10, 1992, when it became clear that budget passage was not likely to occur by July 15, 1992, which would affect payment of state employee salaries, SB 220 was passed, on an emergency basis, in response to the *Biggs* decision issued since 1990, governing the situation of payment to employees when no budget was in place. The letter from the Governor to the Legislature, detailing the necessity of passing SB 220 in an emergency basis, details on the public record the reasons for passage of SB 220. Again, that is the State's

defined explicit position. It is important to remember that as for [sic] as the State was concerned, *Biggs* was an *appropriation question*, and SB 220 specifically addresses *that* issue.

In summary the State's good faith case is premised on the fact that California was faced with an unprecedented cash shortage in the General Fund, which led to the delayed passage of a State budget. Only one other time did a "late budget" actually affect payment of state employees' salaries, and during the Spring of 1992 there was no reason to anticipate that the budget would not just be timely passed or, if it was "late", that it would be so late so as to affect payment of employees' salaries. The Controller's legal counsel and DPA's Chief Counsel both authored separate legal analysis upholding the use of registered warrants as payment to state employees, and the State's action did not deviate from that legal advice, once it became necessary to issue registered warrants for those items which were not listed as priorities under California law. Issuance of registered warrants was required under California statutory law when there is inadequate cash in the General Fund to pay the State's obligations, and the State's executive officers were required to follow California law.

Once the necessity of registered warrants became clear, the State then implemented action to assure negotiability of the registered warrants at face value for the state employees, by working with the respective federal agencies responsible for regulating the banking and financial community to authorize the use and deposit of registered warrants; working with the IRS to grant a special tax status concerning the 5% interest to the recipients/holders of registered warrants; working with banks

to implement measures suggested by banks and the financial community so as to ensure that banks and the financial community would accept registered warrants; getting SB 220 enacted so that an appropriation would exist authorizing prompt payment of state employees salaries, as required by *Biggs*; setting up a hotline through the Controller's office to resolve difficulties any individual state employee may encounter in cashing their registered warrants; setting up a temporary procedure allowing revolving fund checks to be issued to those state employees who encountered difficulties in cashing their registered warrants; and finally, getting a budget ultimately enacted.

The result of the State's good faith belief and good faith actions was almost universal acceptance of employees' registered warrants by the banking and financial community, in save but a few isolated instances, and essentially no evidence of employees who were not able to exchange their registered warrants.

The following people are percipient witnesses:

1. Chris Waddell
   Chief Counsel
   Department of Personnel Administration
2. Rick Chivarro
   Chief Counsel
   Office of the Controller
3. Bob Straight
   Program Budget Manager
   Department of Finance
4. Carrie Cartosian
   Principal Program Manager
   Department of Finance

5. Patricia Bradley
   Budget Analyst
   Department of Finance

DECLARATION OF BOB WHITE

I, Bob White, declare:

The following matters stated in this declaration are true of my own personal knowledge, except as to those matters stated on information and belief, anc as to those matters, I believe them to be true. If called as a witness, I would truthfully and competently testify consistently with the following:

1. I am the Chief of Staff to California Governor Pete Wilson. I began my association with then-Assemblyman Pete Wilson in 1967; in 1971 I served as Deputy Mayor to San Diego Mayor Pete Wilson; and continued as Chief of Staff to U.S. Senator Pete Wilson in 1982. In 1990, I returned to California with Governor-elect Pete Wilson as Chief of Staff and have served in that capacity since.

2. As Chief of Staff, I am responsible for directing and supervising all units in the Governor's Office. I serve as chief aide and adviser to the Governor and am a member of the cabinet. The cabinet is the governor's principal advisory and operational council, and gives the chief executive a comprehensive view of state operations and aids in policy making and long-range planning.

3. The California Constitution (Art. IV, § 12) requires the Governor to submit an annual budget proposal to the Legislature in January for the ensuing fiscal year. The process of developing the budget is a statutory duty of the Department of Finance (DOF). DOF provides the information and the revenue projections on which the annual budget proposal is based. Consistent with the Governor's policy objectives and spending priorities,

DOF prepares, explains, and defends the budget proposal. As a practical matter, the Governor and the Department operate as a single entity in the preparation and presentation of the budget proposal.

4. The decisions made in building the Governor's Budget are categorized as either baseline or policy. Generally speaking, baseline decisions are those which update a budget without changing the level of service provided by a specific program or activity. A budget increase to reflect salary inflation would be an example of such an adjustment.

5. The policy components of the Governor's budget reflect changes in level of service, in program scope, or in State policy. They frequently address significant changes in those programs or activities or propose new ones. These adjustments can be controversial and are an integral part of the State's policy making process, requiring executive decisions to set priorities for the expenditure of limited funds.

6. In putting together the budget proposal the DOF considers information from many sources, including the detailed program budgets of every state agency, the budget change proposals (BCPs) which have been submitted, revenue collections, forecasts of economic activity, financial market data, levels of internal and external borrowing, debt service requirements, and demographic data which may affect demand for employment, welfare, and health benefits.

7. The Department's initial recommendations go through many levels of review and revision in the process of determining final priorities. DOF analysts examine all

aspects of agency baseline budgets and BCP's and discuss their findings with budget and program staff managers in the departments affected. They also prepare written analyses for the DOF management staff and the Governor's Office. When necessary, formal meetings are held with departments and agency secretaries. Communications with the Governor range from formal analyses of various options to informal group discussions with staff. The process of budget building is dialectical. Participants in this process take notes of the discussions, suggested changes, and questions which need to be resolved. These notes provide the basis for subsequent revisions. As each successive revision is presented, the process is repeated. Similarly, draft proposals are submitted, discussed, revised, and resubmitted.

8. Section 12 of Article IV, which was added to the California Constitution, in 1922, requires a consolidated administration proposal covering all state revenues and expenditures. If recommended expenditures exceed estimated revenues, the Governor is required to recommend sources from which additional revenues shall be provided. In order to avoid the fragmentation which the executive budget was enacted to correct, the executive must be able to carry on a confidential dialogue with his appointees and other high level advisors.

9. Without input from those responsible for implementing programs and budgets, comparing needs, and developing priorities for use of scarce funds, the Governor could not develop the comprehensive budget mandated by the Constitution. There is benefit to this dialogue even if proposals are defeated: raising awareness, finding

alternatives, clarifying intentions, or laying the groundwork for future actions. The executive could not be expected to formulate policies or priorities in a reasonable way without the benefit of this dialogue. Opening this deliberative process to public scrutiny would prevent it from occurring or change its character in ways which would greatly diminish its effectiveness.

10. The Governor's Budget is the major policy document presented by the administration. As a practical matter, given the scope of contemporary governmental activity, most policy issues have substantial fiscal implications. Any potential governmental activity or the reduction of existing activity has major fiscal as well as programmatic components. By setting priorities for revenues and expenditures, an administration is indicating what kinds of services government will provide, where these will be expanded, or where they will be reduced, and how the cost will be financed.

11. The Governor uses this budget process to assess program priorities ranging across the entire scope of state government, to subject department proposals to independent analysis by the Department of Finance, and to maintain a dialogue with his appointees.

12. The vitality of the process depends on a vigorous and unfettered give-and-take between the proponents, representing programmatic needs, and the Department of Finance analysts' concern with needs, priorities, policy and fiscal reality. By maintaining the confidentiality of the give-and-take that occurs among department staff, agency personnel, finance analysts, senior staff, and the Governor in the budget process,

frank and open discussion of priorities and realistic constraints is encouraged and the decision making process which leads to the detailed Governor's Budget is improved. The frank discussion of fiscal policy issues would be greatly inhibited if the dialogue, the decision maker's thought processes are subjected to public scrutiny. If confidentiality cannot be maintained, the inevitable result will be disruption of the free flow of ideas, opinions, advice, and candid discussions within departments and between departments, the DOF, and the Governor's Office concerning policies and programs.

13. The California Constitution Article IV section 12(c) provides for the Legislature to pass the budget bill by midnight June 15 of each year. Although, historically, the budget bill has not always been passed and submitted to the Governor by the June 15 deadline, the operating assumption, mandated by the Constitution, is that it will be. Because of other constitutional requirements, it is very difficult for state government to function in the absence of a budget. For example, without a budget the state has no spending authority and only limited authority to borrow. Day to day operations are effectively stymied. Therefore, alternatives to a timely budget are not seriously explored until necessity demands it.

14. The State of California has experienced budget deficits since 1991. Specifically, the budget deficit for the 1990-91 fiscal year was approximately $1.3 billion; in May 1992, the projected deficit for the 1991-92 fiscal year amounted to $3.4 billion.

15. In addition to the acute budget deficits, there were actual *cash* shortages. In late fiscal year 1991-92, the

State of California experienced a serious, and unprecedented cash flow crisis. Internal borrowing of State funds for cash purposes was at its limit. By approximately April 1992, it began to become apparent that the State might run out of cash necessary to pay its obligations for the 1991-92 fiscal year as they came due. Options for dealing with the cash flow crisis were extremely limited: registered warrants; reimbursement warrants (RAWs); or Revenue Anticipation Notes (RANs).

16. On April 22, 1992, the State Controller requested authorization for the transfer of funds to the General Cash Revolving Fund as the first step in the issuance of reimbursement warrants (RAWs). Authorization was requested in the amount of $ 4 Billion.

17. The Governor conferred with the DOF staff, the Attorney General's Office, and members of his staff before declining authorization of the transfer on May 12, 1992. The Governor's letter to Controller Davis explicitly details, as a matter of public record, why such a request was denied and why approval in the amount ultimately decided was appropriate.

> "[A]pproving the transfer of such a large amount not only presumes the Legislature will fail to send a balanced budget package to my desk within the deadline required by the State Constitution – it would encourage such failure. . . . Borrowing as much as $4 billion without having enacted a budget would allow the state to engage in the false pretense, once we have begun a new fiscal year, that we are solvent and able to pay our current bills without registered warrants. ¶I am not willing either to presume –

> or to encourage the Legislature's failure to enact [sic] the budget by the Constitutional deadline.
>
> * * *
>
> A reimbursement warrant payable June 5 for a limited amount is justified because it can be repaid from cash receipts we know we will have at the time. I hasten to add that there should not be a cash crisis; no reimbursement warrant should have been required and none would be required if the Legislature had acted on my earlier request for reductions in current year spending."

(Attached as Exhibit 1 and incorporated herein by this reference is a true and correct copy of the May 12th letter and RAW authorization also approved.)

18. With very limited exceptions, the California Constitution prohibits enactment of individual appropriations bills prior to the enactment of the budget bill. The Governor may recommend an emergency appropriation. He requested an emergency appropriation bill in 1992 (SB 220) to provide authority for the payment of state employees. Again, the letter sent to the Legislature, which is a matter of public record, fully explains the Governor's reason for seeking the emergency appropriation. (Attached as Exhibit 2 and incorporated herein by reference is a true and correct copy of SB 220 and the Governor's letter to the Legislature.)

19. In July 1992, when it became clear the State would have to issue registered warrants, the State took specific steps to ensure the warrants' negotiability, such as:

a. Obtaining authorization from federal financial regulators for depository institutions to accept warrants.

b. Obtaining a special tax status for the interest payment.

c. Setting up a hotline through the Controller's Office to resolve individual employee problems.

d. Setting up a temporary revolving fund procedure to assist any employee who encountered difficulty in negotiating a registered warrant.

20. The State's role as an employer is a small component of its broader governmental role. The State's elected officials must make policy determinations and set priorities to allocate scarce resources among hundreds of competing interests. They must likewise balance the burdens and benefits of increased borrowing or higher levels of taxation for all the State's citizens and be concerned about the long term as well as the short run.

21. The State's decisions, the justification for them, the actions taken to assure that employees would be able to cash the registered warrants are clearly revealed by the public record. Delving into the analyses and discussions which preceded these well documented decisions would be an unwarranted intrusion into the thought processes of the decision maker and the deliberative process that is an integral part of such complex determinations.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and

correct. Executed at Sacramento, California this 3rd day of June, 1993.

/s/ Bob White
Bob White
Chief of Staff
Office of the Governor

[SEAL]

GOVERNOR PETE WILSON

May 12, 1992

Honorable Gray Davis
State Controller
300 Capitol Mall, 18th Floor
Sacramento, CA 95814

Dear Controller Davis:

I am returning, unsigned, your request to authorize the transfer of up to $4 billion to the General Cash Revolving Fund as the necessary first step in using short-term borrowing to meet the State's current year cash needs through the issuance of reimbursement warrants. Although your concern for the state's fiscal well-being is commendable, I believe that a decision to borrow such a significant amount of money would not be fiscally prudent.

I am mindful of the State's legal obligations and of your concern that there may not be enough cash in the treasury on June 30 to meet those obligations. I understand that your latest forecast shows a cash shortage of

approximately $450 million dollars on June 30. I share your concern.

However, approving the transfer of such a large amount not only presumes that the Legislature will fail to send a balanced budget package to my desk within the deadline required by the State Constitution – it would encourage such failure. It would remove the pressure for prompt action by the Legislature to pass both the budget and all necessary bills to implement it, by artificially eliminating the cash crisis that in fact exists because of their earlier failure to act. Borrowing as much as $4 billion without having enacted a budget would allow the State to engage in the false pretense, once we have begun a new fiscal year, that we are solvent and able to pay our current bills without registered warrants.

I am not willing either to presume – or to encourage – the Legislature's failure to encact [sic] the budget by the Constitutional deadline.

And I refuse to engage in the false pretense of solvency in the new 1992-93 fiscal year if the Legislature does fail to pass the budget and required companion bills. However, the transfer to the General Cash Revolving Fund now will permit payment of current year obligatins [sic]. A reimbursement warrant payable July 5, for a limited amount is justified because it can be repaid from cash receipts we know we will have at the time. I hasten to add that there should not be a cash crisis; no reimbursement warrant should have been required and none would be required if the Legislature had acted upon my earlier request for reductions in current year spending.

The budget that was enacted last July was balanced with a combination of program cuts and tax increases which at the time appeared sufficient to solve the State's fiscal dilemma. Even before I formally submitted this year's budget in January, it became clear that last July's solutions were not enough.

In December, I asked the Legislature to convene in order to reduce current year spending.

My January budget also contained a number of proposals to reduce current year spending and to shore up the State's reserves.

The Legislature has not acted on these proposals, which in total would have improved the State's cash position by nearly $800 million.

To summarize, in order to be certain of meeting our obligations in the current year, therefore, I am willing to authorize you to transfer up to $750 million to the General Cash Revolving Fund, provided that you concur with the terms of the attached authorization and so indicate by your signature on the document. This action will ensure not only that the State's schools and investors will be paid fully and on time as required by the State Constitution, but also that all other anticipated obligations for this fiscal year will be met.

With respect to the 1992-93 fiscal year, it is of course essential that the Legislature enact a balanced budget by June 15, so that our usual revenue anticipation notes can be sold July 1. Enactment of the budget by the Constitutional deadline is the only way to assure that the State can pay its bills without issuing registered warrants in

July, as I do not intend to extend the reimbursement warrant process into the next fiscal year.

I request that you keep me fully informed of your activitites [sic] as you implement this authorization, including providing me with a detailed report on June 15 and notifying me at least five days in advance of any sale of reimbursement warrants.

Also, to assure that the Legislature not be relieved of the real cash crisis, that will result from their failure to pass a budget within the Constitutional deadline, I am requesting that you honor the maturity date of July 5 on any reimbursement warrant. And refrain from "rolling over" the warrant to forestall issuance of registered warrants should the Legislature fail to timely pass the budget – and all the bills required as legal authorization of [sic] fully implement the budget.

If you are unwilling to observe this process, I will have no alternative but to revoke immediately my authorization.

I believe that these steps are necessary to keep faith not only with those who have provided services in the expectation of being compensated, but also with the people of California, who have wisely required since the enactment of our Constitution in 1849 that we spend within our means. With these conditions and understandings, I have signed the attached authorization which will

become effective with your signature indicating concurrence.

Sincerely,

/s/ Pete Wilson
PETE WILSON

Attachment

[SEAL]

State of California
GOVERNOR'S OFFICE
SACRAMENTO 93814

PETE WILSON
GOVERNOR

TELEPHONE
(916) 445-2841

May 12, 1992

Honorable Kathleen Brown
State Treasurer
915 Capitol Mall, Room 110
Sacramento, CA 95814

Dear Treasurer Brown:

Today I have authorized the State Controller to transfer up to $750 Million to the General Cash Revolving Fund in order to meet the State's obligations during the current year. Attached is a copy of that authorization.

I request that you assist the Controller in the sale of any reimbursement warrants, should that be necessary, in addition to preparing for the normal sale of revenue anticipation notes by July 1. It is of course essential that the Legislature enact a balanced budget by June 15, to

allow the prompt use of notes in the budget year as has been customary in assisting the State to meet its cash needs.

Sincerely,

/s/ Pete Wilson
PETE WILSON

Attachment

DETERMINATION BY GOVERNOR AND AUTHORIZATION FOR TRANSFER OF MONEYS

Under the provisions of Section 16381, Government Code, I hereby determine that there may be insufficient cash in the General Fund to meet payments authorized by law and hereby direct the Controller to transfer, to the General Cash Revolving Fund from time to time as necessary during the months of May and June 1992, up to $750 Million, or so much thereof as may be needed to be able to meet the State's obligations incurred through July 1, 1992, from special funds and other State accounts containing moneys which may lawfully be transferred therefrom. Any amounts transferred shall be retransferred by the State Controller if needed to carry out the objects for which said funds and accounts were created. Provided further that the maturity date of any Reimbursement Warrant occurs on or before July 24, 1992; that all principal and interest payments on general obligation bonds and revenue anticipation notes are met by the use of resources other than the proceeds of the Reimbursement Warrants; that the Controller reports to me on June 15 updating the State's cash needs and his plans to meet

those obligations; and that I be notified at least five days in advance of any sale of Reimbursement Warrants.

This determination and authorization shall become effective upon its execution by the Controller of the concurrence set forth below and shall remain in effect until July 24, 1992 unless revoked sooner in writing by me.

/s/ Pete Wilson Dated: 18 May 1992
Governor

I concur: /s/ Gray Davis
State Controller Dated: May 19, 1992

CALIFORNIA LEGISLATURE
1991-92 REGULAR SESSION

SENATE DAILY JOURNAL
TWO HUNDRED FORTY-FIFTH LEGISLATIVE DAY

IN SENATE

Senate Chamber, Sacramento
Tuesday, July 14, 1992

The Senate met at 1 p.m.
Hon. Alfred E. Alquist, of the 13th District, presiding,
Secretary Rick Rollens at the Desk.
Assistant Secretary David Valverde reading.

State Capitol
Sacramento, July 14, 1992

To the Members of the California Senate:

As a result of repeated budget impasses, lawsuits challenging the constitutional prohibition against issuing warrants in the absence of a budget have proliferated. In a number of cases, federal courts have intervened and required payment notwithstanding state law.

These orders, some of which are still being contested, usually apply to federal entitlement programs such as Medi Cal and AFDC. In 1991, a federal judge ruled another federal law (the Fair Labor Standards Act) contained an implicit requirement that the wages of state employees covered by the act be paid "promptly", e.g., on or about the regularly scheduled payday.

The Court rejected the argument that this result violated the state's sovereignty under the Tenth Amendment, ruling the lack of a state budget is made irrelevant by operation of the federal supremacy clause. (*Biggs v. Wilson*, CIV-S-90 0942 WBS/GGH.) This case is currently on appeal. Moreover, the application of the Fair Labor Standards Act (FLSA) to various classes of state employees is uncertain and is the subject of on-going litigation.

If employees are not paid and resulting lawsuits are decided in the employees' favor, the state may be subject to injunctive relief and liquidated damages. (Under the FLSA an employee may receive an amount equal to his or her regular paycheck as liquidated damages.) In this time of fiscal crisis such federal court intervention poses special risks to the state's treasury.

Because we do not wish to compromise the state's legal position or subject our already depleted treasury to large potential damage claims, we have little choice but to make some provisions for payment.

Under the circumstances, a general "emergency" appropriation, as authorized by Art. IV, Sec. 12(c), provides an alternative which protects the state's interest without conceding the validity of the *Biggs* ruling.

Based on the above facts and circumstances, I am declaring the existence of an emergency pursuant to Art. IV, Sec. 12(c) and recommending passage of SB 220, as amended.

Cordially,

PETE WILSON, Governor

MESSAGES FROM THE ASSEMBLY

Assembly Chamber, July 14, 1992

Mr. President: I am directed to inform your honorable body that the Assembly amended, and on this day passed, as amended:

SB 220

And respectfully requests your honorable body to concur in said amendments.

Assembly Chamber, July 14, 1992

Mr. President: I am directed to inform your honorable body that the Assembly on this day concurred in Senate amendments to:

AB 2312 AB 2330

RALPH ROMO, Chief Assistant Clerk of the Assembly.

REPORTS OF STANDING COMMITTEES

Committee on Revenue and Taxation

Date of Hearing: July 13, 1992

Mr. President: The Committee on Revenue and Taxation, to which was referred:

AJR 86

Reports is the same back with the recommendation: Be adopted.

LEROY GREENE, Chairman

Above resolution ordered to third reading.

AMENDED IN ASSEMBLY JULY 14, 1992

SENATE BILL **No. 220**

Introduced by ~~Senator Bill Greene~~ *Senators Roberti and Maddy and Assembly Members Brown and Jones*

January 23, 1991

~~An act to amend Sections 3518, 3548, and 3500 of the Government Code, and to amend Section 65 of the Labor Code, relating to public employees.~~ *An act relating to the payment for services of state employees, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

SB 220, as amended, ~~B. Greene~~ *Roberti.* ~~Public employer/employee relations: mediation services~~ *State employees: payment for services.*

Existing decisional law may require prompt payment for specified state employees subject to the federal Fair Labor Standards Act for services rendered by these employees during the period from July 1 until the date that the Budget Act is enacted.

This bill would state legislative findings and declarations that, among other things, the application of the Fair Labor Standards Act to various classes and classifications of state employees is uncertain, and that the purpose of the bill is to eliminate the possibility of injunctive relief and liquidated damages being awarded against the state under that act in the

event employees, whether or not subject to the aforementioned court decision, are not paid as regularly scheduled.

The bill would appropriate from the General Fund and appropriate special funds to the Controller, and would authorize the Controller to expend, an amount no greater than is necessary to enable the Controller to compensate state employees for services rendered, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

~~(1) Existing law permits the Department of Industrial Relations to investigate and mediate labor disputes providing any bona fide party to the dispute requests intervention by the department and to proffer its services to both parties when work stoppage is threatened and neither party requests intervention.~~

~~This bill would require that the department be the sole agency of state government to provide mediators to mediate labor disputes.~~

~~(2) Under the Ralph G. Dills Act, the Governor or his or her representative is required to meet and confer with recognized state employee organizations on wages, hours, and other terms and conditions of employment.~~

~~Existing law provides that, if after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the~~

~~Public Employment Relations Board to appoint a mediator. If the board appoints the mediator, the costs of mediation are required to be paid by the board.~~

~~This bill would, instead, provide that if after a reasonable period of time, the Governor and the recognized employee organization fail to reach agreement, the Governor and the recognized employee organization may agree upon the appointment of a mediator mutually agreeable to the parties, or either party may request the board to contact the California State Mediation and Conciliation Service for appointment of a mediator.~~

~~(3) Existing law requires a public school employer, or its representative, to meet and negotiate with exclusive employee organization representatives, upon request, on wages, hours, and other terms and conditions of employment.~~

~~Existing law requires a higher education employer to meet and confer with exclusive employee organization representatives, upon request, concerning employment conditions.~~

~~Existing law permits, both with respect to public school and higher education employers, the employer or the exclusive employee organization representative to declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and to request the Public Employment Relations Board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.~~

~~Existing law requires the board, if it determines that an impasse exists, to appoint a mediator in accordance with any rules which it prescribes. In this event, mediation services are required to be provided by the board without cost to the parties.~~

~~This bill would, instead, permit the employer or employee organization representative to declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and to request the board to arrange for the appointment of a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.~~

~~The board would be required, if it determines that an impasse exists, to refer the request to the California State Mediation and Conciliation Service.~~

~~(4) The bill would provide that mediation services provided for in the bill would be provided without cost to the parties but would eliminate the specific requirement that they be paid for by the board.~~

~~(5) The bill would specify that it would not prohibit the board from resolving disputes regarding representation matters and unfair representation practices charges that are filed with the board through settlement conferences.~~

Vote: ~~majority~~ 2/3. Appropriation: ~~no~~ yes. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

~~*SECTION 1. Section 3518 of the Government Code is*~~

SECTION 1. The Legislature finds and declares all of the following:

(a) The decision by the federal district court in Biggs vs. Wilson (Civ. S-90-0942-WBS/GGH, October 3, 1991) currently may require prompt payment for services rendered by specified employees subject to the federal Fair Labor Standards Act (29 U.S.C.A. Sec. 201, et seq.). This decision is currently on appeal.

(b) The application of the Fair Labor Standards Act to the various classes and classifications of state employees is uncertain and is the subject of ongoing litigation. It is the purpose of this act to eliminate the possibility of injunctive relief and liquidated damages being awarded against the state under the Fair Labor Standards Act in the event these employees, whether or not subject to the decision, are not paid on their regularly scheduled pay day.

(c) The state faces an unprecedented fiscal crisis, and no Budget Act was enacted by July 1, 1992. Yet the state may be compelled by federal court order to expend monies, not withstanding the absence of a state budget, for Medi-Cal, Aid to Families With Dependent Children, and In-Home Supportive Service workers. In the face of these federal court decisions, it would be inequitable to not enact legislation allowing payment of state employees.

(d) These federal court orders may substantially interfere with the ability of the state to manage its fiscal affairs in this time of crisis.

(e) Further the state does not wish to compromise in any manner any views with regard to the appropriate application of the Fair Labor Standards Act to state employees.

SEC. 2. There is hereby appropriated from the General Fund and any appropriate special fund to the Controller, and the Controller is authorized to expend, an amount no greater than that necessary to enable the Controller to compensate state employees for services rendered by those employees during the period from July 1, 1992, until the date that the Budget Act of 1992 is enacted.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Federal court decisions have created confusion concerning the compensation of certain classes of state employees that will result in unreasonable inequities. In order to remove the confusion surrounding the issue of what classes and classifications of state employees are entitled to receive compensation for their services before the Budget Act of 1992 is enacted, it is necessary for this act to take effect immediately.

All matter omitted in this version of the bill appears in the bill as introduced in the Senate, January 23, 1991 (J.R. 11).

DECLARATION OF JANICE ROGERS BROWN

I, Janice Rogers Brown, declare: The following matters stated in this declaration are true of my own personal knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true. If called as a witness, I would truthfully and competently testify consistently with the following:

1. I am the Legal Affairs Secretary to California Governor Pete Wilson. I have held this position since January 7, 1991.

2. The Legal Affairs Office monitors all significant state litigation, generally supervises departmental counsel, and acts as liaison between the Governor's Office and the Attorney General's Office when representation or client advice is needed. As Legal Affairs Secretary, I am a member of the Governor's senior staff and act as the Governor's counsel. In the latter capacity, I provide client advice on litigation, on legislation, and on the legal implications of proposed policies on a daily basis. As a member of the senior staff, I also participate in predecisional discussions where ideas are tested and policy debated. I often have access, and sometimes provide, to information, both written and oral, for the Governor to assist him in formulating a particular governmental action.

3. Since the executive is comprised of more than a hundred agencies, departments, boards, and commissions, it is frequently necessary to consult with departmental counsel to understand specific program issues before appropriate client advice can be formulated. In addition, because many issues are questions of first impression, deputy attorneys general with particular

expertise may also be consulted. Some of these discussions occur in meetings; others by telephone. I take notes during these conversations and I assume other participants may also create a written summary.

4. The Office of the Attorney General provides legal representation to the Governor and provides both formal and informal opinions.

5. All communications with the Governor, other legal counsel and deputy attorneys general, whether oral or written, are treated as strictly confidential discussions protected by the attorney/client unless the privilege is expressly waived. All written communications are clearly marked "attorney/client privilege" or "attorney work product" or both.

6. During the 1992/93 budget crisis, the Governor sought and received legal advice from his Legal Affairs Office. In addition, in formulating my responses to questions, I sought and was provided advice from legal counsel of other departments, including the Department of Personnel Administration and the Office of the Attorney General. All of these communications, whether oral or written, were treated as strictly confidential discussions protected by the attorney/client privilege and all written communications were so designated. Except for specific communications of the Department of Personnel Administration, the privileges applicable to these discussions have not been waived.

7. On occasion, the advice provided by the Legal Affairs Office was also covered by the attorney work product privilege because it related to pending or ongoing litigation.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Sacramento, California this 4th day of June, 1993.

/s/ Janice Rogers Brown
Janice Rogers Brown
Legal Affairs Secretary
Office of the Governor

Supreme Court, U.S.
FILED
MAR 3 1994
OFFICE OF THE CLERK

No. 93-1270

In The

Supreme Court of the United States

October Term, 1993

STATE OF CALIFORNIA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

MICHAEL L. PARR, et al.,

Real Parties In interest.

Petition for Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FILED BY REAL PARTIES IN INTEREST

CARROLL, BURDICK & MCDONOUGH
*GARY M. MESSING
CATHLEEN A. WILLIAMS
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
Telephone: (916) 446-2222

Attorneys for Real Parties in Interest Michael L. Parr, et al.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

42 pp

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in denying Petitioner's petition for writ of mandamus, which requested the Court of Appeals to vacate the District Court's order granting Real Parties' in Interest motion to compel discovery?

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I.

THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY REFUSED TO INVOKE THE EXTRAORDINARY REMEDY OF MANDAMUS AND THEREFORE THE PETITION OF CERTIORARI SEEKING REVIEW OF THE NINTH CIRCUIT'S DECISION SHOULD BE DENIED.

A. Introduction.

Notwithstanding Petitioner STATE OF CALIFORNIA's strenuous claims to the contrary (see, Petition, page 12), the controversy Petitioner seeks to bring before this Court involves a discovery dispute that was decided adversely to Petitioner on June 18, 1993, by the Magistrate Judge of the U.S. District Court for the Eastern District of California (Order filed 6/18/93, Petitioner's Appendix, pages 28-47). Petitioner requested reconsideration of this discovery order by the U.S. District Court Judge, and this request was denied on September 29, 1993, on the grounds that the order was not clearly erroneous or contrary to law (Order filed 9/29/93, Petitioner's Appendix, page 48). Petitioner's petition for writ of mandamus to review the District Court's affirmation of the discovery order was then denied on November 17, 1993 (Order filed 11/17/93, Petitioner's Appendix, page 1). In light of the refusal of these courts to vacate the discovery order, Petitioner was admonished by the Magistrate Judge on January 6, 1994 that its continuing failure to fulfill its discovery obligations as ordered by the court would subject it to sanctions under the Federal Rules of Civil Procedure, Rule 37(b) (Order filed 1/6/94, Petitioner's Appendix, pages 49, 51).

The issue before the Court thus does not involve the "application of the Fair Labor Standards Act ('FLSA' or 'Act') 29 USC §§ 206, 207, 216(b), 260; Code of Federal Regulations §§ 531.27, 531.34, and 531.35; and Federal Rules of Civil Procedure, Rule 37(b), in light of the Tenth Amendment, U.S. Constitution" as Petitioner claims (Petition, page 1). Rather, Petitioner prays for intervention by this Court in order to avoid the orderly operation of the Federal Rules of Civil Procedure for pre-trial discovery, and the well-established legal principles which govern the assertion of privilege by a governmental litigant. Such a case is not suited for review on a petition for certiorari. As Justice Brennan has noted:

> . . . ordinarily an application by the District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to the particular set of facts.
>
> *Appalachian Power Company v. American Institute of Certified Public Accts.*, (1959) 80 S.Ct. 16, 18 [Memorandum Order at 361 U.S. 887].

Of course, this principle applies with even greater force when a party seeks review by certiorari of the Court of Appeal's denial of a petition for mandamus.

The Court of Appeals for the Ninth Circuit denied Petitioner's petition for writ of mandamus on the grounds that it did not meet the requirements for issuance of the writ, citing *Bauman v. United States District Court*, (9th Cir. 1977) 557 F.2d 650. (Petitioner's Appendix, page 1.)

In *Bauman v. U.S. District Court, supra*, 557 F.2d at 654, the Ninth Circuit, guided by the precedent of this Court restricting the invocation of mandamus, set forth five guidelines for the determination of whether extraordinary relief is warranted. 557 F.2d at 657-661. The discovery controversy at stake in this case did not qualify under these guidelines for the issuance of mandamus, and therefore this Petition should be denied.

B. Petitioner has an Adequate Remedy Through Direct or Interlocutory Appeal.

The first guideline set forth in *Bauman v. U.S. District Court, supra*, 557 F.2d at 656, for issuance of a writ of mandamus requires the party seeking such relief to demonstrate that there are no other "adequate means" such as direct or interlocutory appeal under 28 USC § 1292(a)(1) for obtaining review. As the court explained,

> The availability of a direct appeal would weigh strongly against a grant of mandamus. Moreover, even if the grant of an interlocutory appeal from the order is not a foregone conclusion, the possibility remains . . . that a section 1282(a)(1) appeal may be available. The possibility, or uncertainty, regarding appealability militates against issuance of a writ here. The Supreme Court has repeatedly stated that a mandamus

> petitioner must "satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'." *Kerr v. U.S. District Court* [426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976)].
>
> *Bauman, supra,*
> 557 F.2d at 654.

The Petitioner certainly cannot meet this burden here. The point is not addressed in the Petition, and the record which is the basis of the challenged rulings has not been provided to this Court. If indeed the discovery order implicates constitutional concerns under the Tenth Amendment, as Petitioner confidently asserts, any error can certainly be addressed by reversal of the judgment on appeal in the event sanctions are imposed under Federal Rules of Civil Procedure Rule 37(b) for Petitioner's failure to comply with the challenged discovery order. (Petition, page 2.)

C. The District Court's Order Does Not Damage Petitioner in a Way Not Correctable on Appeal.

The Court of Appeals for the Ninth Circuit described the second guideline for issuance of mandamus relief as the determination of "whether the damage . . . arising from the order is correctable on appeal." 557 F.2d at 656. As the court observed, "[i]f the district court's order . . . is wrong and if [petitioner] prevails on the merits, the error can be remedied on appeal without great difficulty." *Id.*

As noted above, any error in the Court's discovery order can be corrected on appeal, and therefore Petitioner

has not borne its burden of proof as to this element of the test for the granting of relief through mandamus.

D. The District Court's Order is Not Clearly Erroneous as a Matter of Law.

The Court of Appeals for the Ninth Circuit requires the Petitioner to show clear error as a matter of law as a prerequisite to the issuance of a writ of mandamus. As the court observed in *Bauman, supra,* 557 F.2d at 654, citing decisions of this Court, " . . . review by mandamus does not 'run the gauntlet of reversible errors'." Rather, "only exceptional circumstances amounting to a 'judicial usurpation of power' will justify the invocation of this extraordinary remedy." *Id.* [citations omitted].

Petitioner cannot demonstrate that the court committed *any* error in deciding that Real Parties in Interest were entitled to certain discovery under well-established principles of federal law (Petitioner's Appendix, pages 33-46). The only cases cited by Petitioner involve this court's refusal to quash a criminal subpoena directed to a U.S. president, *United States v. Nixon,* 418 U.S. 683 (1973) (Petition, page 23) and a manifestly inapposite California Supreme Court decision involving the California Public Records Act, *Times Mirror v. Superior Court,* 53 Cal.3d 1325, 1347 (1991). (Petition, pages 23, 26.)

Therefore, Petitioner has failed to carry its burden of proof as to the propriety or necessity of extraordinary relief by mandamus.

E. The District Court's Order is Not an Oft-Repeated Error which Manifests a Persistent Disregard of the Federal Rules.

The fourth guideline for issuance of mandamus relief comes into play when there is a "recurring pattern of similar and erroneous rulings by the same district judge" which brings the case "within the scope of the principle articulated by the Supreme Court in [*LaBuy v. Howes Leather Co.*, (1957) 352 U.S. 249, 257-260, 77 S.Ct. 309]." Here, there is no evidence of any error, and thus no pattern of error.

F. The District Court's Order Does Not Raise Issues of First Impression Nor Create New and Important Problems.

Finally, the Court of Appeals looks to the "magnitude of the issue" in the determination of whether mandamus is appropriate; to the extent that "[t]he controversy is tied to the peculiar facts of the action," it will not be considered a candidate for mandamus review. *Bauman v. U.S. District Court, supra*, 557 F.2d at 660-661.

The discovery order made by the District Court relied on well-established principles of law. The order contained four basic rulings. First, it stated that non-privileged information should be disclosed:

> The names of the state officials who participated in making the decision to pay employees with registered warrants, which Judge Burrell found are not cash or its equivalent and, hence, violated the Act, are not arguably protected by the deliberative process privilege; neither are the

> facts about when and where pertinent meetings and discussions occurred, the facts that were considered in reaching the decision, the existence of documents recording such meetings and discussions, or the contents of documents to the extent they may only state, explain or justify the decision actually made vis-a-vis the process that produced it. Such information does not threaten the public interest in frank discussion during deliberation of state policy.
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix, page 38.)

Second, it stated the deliberative process privilege must be adequately supported:

> The exchange of ideas, recommendations made and opinions expressed during deliberation of the state's decision to pay employees with registered warrants are within the privilege if it is timely claimed and supported by a suitable affidavit.
>
> * * *
>
> Accordingly, for each claim of deliberative process privilege heretofore asserted by defendants in response to plaintiffs' discovery requests, whether at deposition or by interrogatory or request for production of documents, the state must within 30 days answer whether the discussions inquired about occurred and, if they did, identify when, who participated, the topic of the discussion, and the decision reached, if any. If defendants resist disclosure of the sort of "frank discussion" that is within the privilege, they

must support their claim with the affidavit of the appropriate government official.

Order of Magistrate
Nowinski, dated 6/18/93
(Petitioner's Appendix, page 39.)

Thirdly, it stated the attorney-client privilege was waived by the reliance on advice of counsel as the basis of the good faith defense to FLSA liability (29 USC 216(b)):[1]

---

[1] The Petitioner has taken the position in this discovery dispute that it is entitled to a limited waiver of the attorney-client privilege, such that it can disclose selected communications of counsel and withhold all other information and advice at will (Petition, pages 27-28; letter of Attorney General dated 3/31/93, Petitioner's Appendix pages 154-168). As Petitioner states, "[o]nce Plaintiffs were permitted access to the counsel who actually provided the advice concerning the legal proposition that issuance of registered warrants to State employees did not violate the FLSA, and the facts disclosed that counsel did not indicate the issue as problematic, it is unclear why Plaintiffs should then be entitled to increasingly more and greater access to all the State's attorneys, even as to that one FLSA issue (Petition, pages 27-28).

In actuality, it is perfectly clear why Real Parties in Interest are entitled to full disclosure of advice, as the District Court ruled. Selective disclosure poses the risk that a litigant will gain an advantage by revealing only the information which supports its position. Events subsequent to the U.S. Magistrate Judge's order have borne out the wisdom of the ruling.

On February 10, 1994, the State Controller's Chief Counsel, Richard Chivaro, appeared and testified for the first time without claim of privilege. He revealed that the State *disregarded* the advice of two of its attorneys and deliberately pursued a policy that would make it more difficult for State employees to readily negotiate their registered warrants after the banks began to refuse them and the budget impasse continued in August, 1992.

> . . . assuming that the state might make the required demonstration of a confidential communication from client to attorney, the communication would be privileged. But, if the same communication inextricably included advice about whether the use of registered warrants complied or might not comply with the FLSA, defendants either waive the privilege or impliedly consented to disclose the information by asserting a good faith defense, for which all intents and purposes is no different than an 'advice of counsel' defense. [citations omitted]; 2 Weinstein's Evidence, "Privileges," § 511[02], pp.511-7.
>
> Accordingly, defendants must either withdraw their good faith defense or disclose all of the advice of counsel they received concerning FLSA compliance.
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix,
> pages 41-42.)

Fourthly, it stated the attorney work product privilege was either waived or inapplicable:

> The work product doctrine exists to ensure that in preparing a client's case for trial, a lawyer be allowed to assemble and sift information, identify strengths and weaknesses, and make his plan for presenting his case. The identification

---

The implications of this evidence for Petitioner's liability under the FLSA are significant and demonstrate with clarity why the Real Parties in Interest should be entitled to full access to relevant attorney communications in accordance with the court's order. (See, Respondent's Appendix, pages 2-25.)

> of strengths and weaknesses is apt to be particularly relevant to the question whether defendants had reasonable grounds to believe their continued use of registered warrants complied with the FLSA. To give absolute protection to defendants' attorneys' mental impressions, conclusions, opinions, or legal theories prepared in anticipation of this litigation, thus bars plaintiffs from access to information relevant to test defendants' good faith defense. Under such circumstances, defendants must be deemed to have waived the privilege or to have consented to disclose the information. Alternatively, I find that defendants have put their opinion work product in issue by pleading good faith as a defense and that plaintiff's need for the information is compelling. *See Holmgren v. State Farm Mutual Automobile Ins. Co.*, 1992 U.S. App. Lexis 29008, 92 Daily Journal DAR 15099 (9th Cir. 1992).
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix,
> pages 45-46.)

These rulings represent a routine exercise of the federal court's obligation to apply and enforce federal law and procedure for discovery to a case involving a state defendant. These rulings could have arisen in any context where Congress has imposed statutory liability upon the states, and therefore the Petition raises no special concerns about the Tenth Amendment, the principles of federalism, or the provisions of the Fair Labor Standards Act. (See, Petitioner's "Questions Presented," Petition, page i.) If the Federal Rules of Civil Procedure are to be implemented by trial courts as Congress intended, the

challenged discovery order in this case must be allowed to stand until the issues are ripe for review on appeal. *Kerr v. United States District Court*, 426 U.S. 394, 402-404, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725.

II.

CONCLUSION.

For all the reasons stated, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

Dated:
March 3, 1994

CARROLL, BURDICK & MCDONOUGH
GARY M. MESSING
CATHLEEN A. WILLIAMS

By: CATHLEEN A. WILLIAMS

Attorneys for Real Parties in Interest
MICHAEL L. PARR, et al.

APPENDIX

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
755 Riverpoint Dr., Suite 200
West Sacramento, CA 95605-1634
(916) 372-6060

JOE R. McCRAY, A Law Corporation
By Roberta D. Perkins (S.B. No. 153074)
433 Turk Street
San Francisco, CA 94012
(415) 775-3900

Attorneys for Plaintiffs/Consenters

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants. _____/	No. CIV-S 92-1115 GEB-PAN No. CIV-S 92-1493 GEB-PAN No. CIV-S 92-1544 GEB-PAN

JAMES R. ADAMS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

JOHNNY G. ADKINS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PLAINTIFFS' SUPPLEMENTAL MOTION FOR ORDER FOR SANCTIONS AGAINST DEFENDANT RE: NON-RESPONSIVENESS TO DISCOVERY ORDERS UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 37(b)(2) and Rule 37(d)

Date: 3/2/94
Time: 9:00 AM
Place: Dept. 10

I.

INTRODUCTION

Since Plaintiffs' Motion for Sanctions was filed on February 2, 1994,[1] the Defendants' intransigence in resisting the discovery orders of this Court has deepened, with one notable exception: on February 10, 1994, the State Controller waived the attorney-client privilege and deliberative process privileges previously asserted and Chief Counsel Richard Chivaro appeared and testified at his deposition.

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[1] For the background of this action and status of discovery, Plaintiffs request that reference be made to the original motion, Points and Authorities, pages 1-19.

This supplemental motion is filed in order to place a complete record before the Court of the Defendants' conduct as it relates to the award of sanctions and to ensure that Defendants' claims of lack of notice have been adequately addressed. This supplemental motion raises two issues relevant to the imposition of sanctions: First, it outlines the conscious policy of Defendants to continue their non-compliance with the Court's orders, and, second, defines the prejudice Plaintiffs will suffer if any lesser sanction is imposed.

A. Prejudice.

For purposes of this motion, the significance of Mr. Chivaro's testimony is that he provided Plaintiffs a glimpse – albeit brief and partial – into the shadowy inner circle of policymakers who were actually deciding the State's course of conduct during the politically tumultuous months of the budget impasse. In providing this glimpse, his testimony has allowed Plaintiffs to define with far more precision the actual prejudice they have suffered because of their inability to pierce the curtain of secrecy Defendants have drawn around the identity and role of these policymakers.

It is critical for Plaintiffs to demonstrate such prejudice if the Court is to impose the harsh sanction of striking Defendants' "good faith" defense in this FLSA action, as the Court of Appeals for the Ninth Circuit has repeatedly held. See, Motion filed February2, 1994, pages 24-26.

B. Continuing Non-Compliance.

In addition, the events since February 2, 1994, demonstrate with stark clarity the Defendants' defiance of this Court's authority. At the time of the previous motion, the thirty-day stay of the re-commencement of the deposition of Robert Hauck had not yet expired, and Defendants presumably could still argue that the Supreme Court might grant their (not yet filed) application for stay of discovery. Indeed, on February 3, 1994, Deputy Attorney General Larry Raskin advised Plaintiffs' counsel in writing that "until the Supreme Court rules on the application for stay, the same privileges which have been asserted up until now would continue to be asserted in all the depositions scheduled for next week." (Supplementary Declaration of Cathleen A. Williams in Support of Plaintiffs' Motion for Sanctions filed February 8, 1994, attached as Appendix 1 in Appendices to Plaintiffs' Supplemental Motion, filed herewith, "Exhibit A" thereto.)

However, the application for stay was summarily denied by the Supreme Court on February 4, 1994, before the depositions were scheduled to commence on February 7, 1994 (Supplementary Declaration of Cathleen A. Williams, Appendix 1 hereto.) Notwithstanding this fact, when the Deputy Attorney General appeared for the duly-noticed deposition of Mr. Hauck on February 7, 1994, Mr. Hauck was not produced as a witness. (Appendix 1 hereto, its "Exhibit F"). On the next day, February 8, 1994, Mr. Stancell also did not appear for his deposition (Appendix 1 hereto, its "Exhibit G") and the State declared its intention to continue to assert privileges with respect to the deposition of Mr. Hill.

It is thus clear that Defendants no longer relied on any legal pretext or rationale to explain their refusal to comply with the orders of this Court.

It is critical for Plaintiffs to place this evidence before the Court so that the record is complete as to the wilful violations of the State of court-ordered discovery.

II.

CHRONOLOGY AND STATUS OF DISCOVERY SINCE FEBRUARY 2, 1994

2/2/94: Motion for Sanctions Filed.

2/3/94: Defendants counsel Deputy Attorney General Larry G. Raskin advises that the State's Petition for Certiorari was filed on that date, and the application for a stay "will be filed tomorrow," stating, "The same privileges which have been asserted up till now would continue to be asserted in all of the depositions scheduled for the next week." (Appendix 1 hereto, its "Exhibit A".)

2/4/94: Application for Stay denied by Supreme Court (see, Appendix 2 hereto, February 4, 1994 letter from Supreme Court).

2/7/94: Deposition of Robert Hauck commences; deponent does not appear. Defendants' counsel states on the record he will not appear. (Appendix 1 hereto, "its" Exhibit F, page 3, lines 13-14.)

2/8/94: Deposition of LaFenus Stancell commences; deponent does not appear. Defendants' counsel states privileges are and will continue to be claimed. (Appendix 1 hereto, "Exhibit G," page 3 line - page 4 line 8.) Defendants' counsel states the same privilege will be asserted

with respect to Eugene Hill, whose deposition is scheduled for February 10, 1994. (Appendix 1 hereto, "Exhibit G," page 6, lines 18-27.)

2/8/94: Plaintiffs file Supplementary Declaration of Cathleen A. Williams (Appendix 1 hereto).

2/9/94: Plaintiffs' counsel receives Defendants' Opposition to Motion for Sanctions, claiming motion untimely because of filing of Supplementary Declaration. (Opposition on file; judicial notice requested.)

2/10/94: Deposition of Richard Chivaro, Chief Counsel for the Controller, commences; deponent appears and testifies without claim of privilege. (Transcript attached as Appendix 4 hereto.)

2/11/94: Plaintiffs' file Reply to Defendants' Opposition, personally served and mailed on Defendants. (Appendix 3 hereto.)

2/14/94: Court orders continuance of February 2, 1994 motion to February 23, 1994. (Stipulation on file; judicial notice requested.)

2/16/94: Plaintiffs' file instant motion, to be set for March 2, 1994.

III.

THE TESTIMONY OF RICHARD CHIVARO DEMONSTRATES THE MATERIALITY OF THE INFORMATION WITHHELD BY DEFENDANTS AND THE PREJUDICE SUFFERED BY PLAINTIFFS.

A. Background.

From the time the first deposition was taken in this case, of LaFenus Stancell on August 18, 1992, Plaintiffs

have sought to discover the circumstances surrounding the State's initial decision, at the suggestion of the State Controller, to make available to State employees an alternative means of cashing their registered warrants after major banks announced in mid-July that they would no longer accept them. (Stipulation re: Discovery Disagreements filed hereton June 4, 1993, pages 53-57.) The State Controller proposed that State employees be given the opportunity to exchange their warrants for cash by presenting them to their departments' "revolving funds." At his deposition, Mr. Chivaro explained the reasoning of the State Controller in urging adoption of the policy, and his subsequent communications with Senior Assistant Attorney General Eugene Hill[2] seeking authorization from the Department of Finance for the exchange program.

> "Q. [by Ms. Williams] Okay. So before you called him [Mr. Hill] he had been informed about the communications from the Controller's office to Mr. Stancell about the program?
>
> A. Yes, prior to contacting the Department of Finance – well, let me back up a little bit.
>
> When it became apparent to us that some banks were going to back out of this deal, our office became more and more uncomfortable with running afoul of the FLSA, and we contacted Gene with the idea that we needed to have a fall-back position in the event that the banks were not going to continue to accept

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[2] As noted in the previous motion, Mr. Chivaro previously testified that the State Controller was acting upon Mr. Hill's advice. (Motion, page 12.)

these. And we – the suggestion was mine that we utilize the payroll revolving funds. The idea had been discussed in the Biggs case early on for making payments to the employee in the absence of a state budget, so it was something that was kicked around before.

But, again, utilizing the revolving fund has to have the approval of the Department of Finance. Department of Finance limits its use to very specific purposes. We want approval to use it for this purpose. We felt that if Gene Hill could explain to the Department of Finance again what the vulnerability was with the FLSA and subjecting them to potential damages, that he would be the best one to make the argument for us."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 132:22-133:18.

Mr. Hill was in agreement with the Controller's position that the "revolving fund" exchange program was advisable, and the FLSA implications of any failure by the State to ensure the negotiability of registered warrants were explicitly discussed:

"Q. And how did you explain to Mr. Hill your perception of the vulnerability of the registered warrants under FLSA? What did you say to him?

A. Well, the conversation was to the effect – I don't recall the exact words, but it was to the effect that we had to have cash equivalent under the FLSA, and that obviously if the banks were not accepting these things, it would be hard to characterize them as a cash equivalent under

any circumstance. If you can't redeem them, what good are they.

We discussed this with Gene Hill. Gene Hill was very concerned about the fact that the banks were pulling out, and he agreed with us that something needed to be done, and that is when I ran the suggestion by him. He thought it was a good suggestion and he agreed to take it forward for us."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 134:24-135:11.

In fact, Mr. Chivaro believed that an understanding had been reached with Mr. Hill:

"A. I think it was our understanding that we could not require anybody to use their revolving funds in this matter; that we needed the Department of Finance to issue some instructions to them as to how this would work.

We would have no authority to require that it would be done. It was our intent that they do it, and it was our understanding with Gene Hill that he would do whatever he could to get the Department of Finance to make the revolving funds available to everybody."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 138:7-138:16.

Subsequently, however, the State Controller's office learned that the Department of Finance had cancelled the exchange program. It received a memo around July 30, 1992 from Finance which seemed to "make it clear, contrary to our understanding, that the exchange program

was to be considered a one-time procedure which would apply to the July master payroll only." (Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto, 136:6-136:9, and Exhibit 20).

Mr. Chivaro then called Mr. Hill about the cancellation of the registered warrant/revolving fund exchange:

> "A. We immediately – Bob Shuman and I immediately called Gene Hill about that. We had fax'd that for his information and then followed it up with a telephone call shortly thereafter. We were concerned because the procedure was worked out with Gene Hill with the understanding that if the banks were pulling out, that we needed a mechanism that the employees would still be guaranteed payment. And Gene Hill was supposed to have worked with the Department of Finance and possibly even the Governor's office – I'm not quite sure whether he did that or not – to make sure that this system would work and there would be no interference from any other agency.
>
> Gene, at the time we called him, basically stated that he had no explanation, that he thought that everybody was in agreement that the revolving funds could be used."
>
> Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 132:5-132:21.

After this call, there was one further communication with Mr. Hill on the decision to cancel the exchange program:

> "Q. When the program was discontinued by Department of Finance and you spoke to Gene

Hill, you said that he told you he didn't have an explanation?

A. As to why Finance had – he –

Q. No, you go ahead.

A. I'm sorry. He did later call us back and tell us that Finance had some concerns with the – that the revolving fund accounts of each agency would be depleted and then they would have to operate without revolving funds, and we would have to replenish them with the registered warrant.

We do not maintain records which would indicate the balances of each agency general fund – revolving fund, so we would not know how much money they had available to them at the time, and we would not know whether or not they had actually depleted it on the basis of their payroll.

Q. Well, did you discuss with him at that time that the revolving funds, if in fact they were being depleted, could be replenished by submitting the registered warrants to some bank for cashing?

A. Yes, we did.

Q. And what did he say to that, if anything?

A. Basically that it wasn't his call, that he would talk to the Department of Finance about it. But we did not know and we were not privy to the conversation that they had with Finance

> or whoever he spoke to concerning this problem."
>
> Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 135:12-136:11.

Of course, it is precisely the discussions that Mr. Hill had with the Department of Finance that the State has not disclosed under its continuing claim of privilege. (See, Points and Authorities in Support of Plaintiffs' Motion for Sanctions filed February 2, 1994, pages 17-19.) Mr. Chivaro's testimony establishes that the cancellation occurred even though two attorneys agreed that it was advisable for the State to provide State employees with an alternative means of cashing their registered warrants in light of the requirement that employees be paid "in cash or its equivalent" under the FLSA.

Given the State's burden of proof with respect to the good faith defense, i.e., that "it had an honest intention to ascertain the requirements of the Act and reasonable grounds for believing that their conduct was not violative," (see, Order of Magistrate Nowinski, dated June 18, 1993, previously attached as "Exhibit A" to Plaintiff's Motion for Sanctions filed February 2, 1994), the testimony was a startling revelation. The Department of Finance disregarded the advice of the Controller's Chief Counsel, with which Mr. Hill was in complete agreement, and deliberately pursued a policy which would make it more difficult for State employees to readily negotiate their registered warrants after banks began to refuse them and the budget impasse continued in August, 1992.

The testimony is also startling because it contravenes the central tenet of the State's position throughout the discovery dispute now before the Court. The State has consistently claimed it has nothing to hide. In the March letter in which Defendants outlined "the case it intends to put on," (see, page 8, Order of Magistrate Nowinski, dated June 18, 1993, previously attached as "Exhibit A" to Plaintiffs' Motion for Sanctions filed February 2, 1994), counsel made the following representation:

> "The Controller's legal counsel and the DPA's legal counsel both authored separate legal analysis upholding the use of registered warrants as payment to state employees, and the state's action did not deviate from that advice once it became necessary to issue registered warrants . . . "
>
> Joint Stipulation filed June 4, 1993, Exhibit F, "State's Description of its Case," (unnumbered) page 3, Appendix 54, [This document is also included in the Petition as Appendix, page 166.] Petition for Writ of Certiorari filed on or about February 3, 1994, Appendix, page 166.)

In sum, the State not only concealed this critical information but represented to the parties *and to the Court* that it did not exist.

As noted in Plaintiffs' Motion for Sanctions filed February 2, 1994, the Ninth Circuit has defined the type of prejudice which justifies the sanction of dismissal as wilful conduct which "threaten[s] to interfere with a rightful decision of the case." *Fjelstad v. American Honda*

Motor Co., (9th Cir. 1985), 762 F.2d 1334, 1337-1342. Mr. Chivaro's testimony reveals that this type of extreme prejudice is present in this case.

IV.

CONTINUING NON-COMPLIANCE AFTER FEBRUARY 2, 1994

As noted above, after February 4, 1994, when the Supreme Court denied the application for stay filed on that date, all the State's excuses and arguments for avoidance of the June 18, 1993 order dropped away, and the underlying State "policy" of non-disclosure was revealed.

The Court of Appeal for the Ninth Circuit has repeatedly made clear that the dismissal sanction should be imposed for wilful, as opposed to negligent or inadvertent, violations of discovery orders. (See, e.g., *Porter v. Martinez*, (1992), 941 F.2d 732, 733, where the court reversed the dismissal of a case brought by a "homeless, indigent, severely handicapped" *pro se* plaintiff who had failed to comply with court-ordered discovery; also, *Fjelstad v. American Honda Motor Co.*, (9th Cir. 1985), 762 F.2d 1334.) The State's refusal to produce deponents for depositions – in the face of the Court's warning and during the pendency of the Motion for Sanctions – can only be described as flagrant. Therefore, the most severe sanction of dismissal in accordance with this Court's January 6, 1994 warning is warranted.

V.

CONCLUSION

On t he basis of the State's conduct in this case, the sanctions outlined in January 6, 1994 order should be imposed. In addition, Plaintiffs should be awarded the costs and fees incurred in bringing this motion and preparing and convening the depositions of Mr. Hauck, Mr. Stancell and Mr. Chivaro.

Respectfully submitted,

Dated: February 16, 1994

CARROLL, BURDICK & McDONOUGH
Gary M. Messing, Esq.
Cathleen A. Williams, Esq.

By: /s/
Cathleen A. Williams
Attorneys for Plaintiffs and Consenters

Gary M. Messing, Esq. (S.B. No. 075363)
Cathleen A. Williams, Esq. (S.B. No. 068029)
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
(916) 446-2222

Joel H. Levinson, Esq.
755 Riverpoint Dr., Suite 200
West Sacramento, CA 95605-1634
(916) 372-6060

JOE R. McCRAY, A Law Corporation
By Roberta D. Perkins (S.B. No. 153074)
433 Turk Street
San Francisco, CA 94012
(415) 775-3900

Attorneys for Plaintiffs/Consenters

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants. _____/	No. CIV-S 92-1115 GEB-PAN No. CIV-S 92-1493 GEB-PAN No. CIV-S 92-1544 GEB-PAN

JAMES R. ADAMS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

JOHNNY G. ADKINS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

APPENDICES TO PLAINTIFFS' SUPPLEMENTAL MOTION FOR ORDER FOR SANCTIONS AGAINST DEFENDANT RE: NON-RESPONSIVENESS TO DISCOVERY ORDERS UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 37(b)(2) and Rule 37(d)

Date: 3/2/94
Time: 9:00 AM
Place: Dept. 10

The attached documents are filed as Appendices to Plaintiffs' Supplemental Motion for Order for Sanctions against Defendant re: Non-Responsiveness to Discovery Order.

DECLARATION

I, CATHLEEN A. WILLIAMS, declare:

1. I am an attorney at law, duly licensed to practice before all of the courts in the State of California, and am an Associate with the law firm of CARROLL, BURDICK & McDONOUGH, attorneys of record for Plaintiffs and Consenters herein.

2. I declare that all the documents attached hereto are true and accurate copies of pleadings already filed with the Court in this matter, correspondence sent and

received by me in this action, and certain pages of original transcripts of depositions which have been previously taken in this action.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed at Sacramento, California on February 16, 1994.

/s/
CATHLEEN A. WILLIAMS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,
Plaintiffs,
vs .
STATE OF CALIFORNIA,
Defendant.
_____/

No. CIV-S 92-1115
GEB-PAN
CERTIFIED COPY

Deposition of
RICHARD J. CHIVARO
February 10, 1994
Volume 2
Reported by: HEATHER S. OLSON, CSR 4680

Phillips and Associates
CERTIFIED SHORTHAND REPORTERS

1801 I STREET, FIRST FLOOR •
SACRAMENTO, CA 95814
(916) 448-0505

* * *

[p. 132] Mr. Hill

Do you know if there was a response from Gene Hill concerning Bob Shuman's message that DOF had halted the registered warrant/revolving fund check exchange?

A. We immediately – Bob Shuman and I immediately called Gene Hill about that. We had fax'd that for his information and then followed it up with a telephone call shortly thereafter. We were concerned because the procedure was worked out with Gene Hill with the understanding that if the banks were pulling out, that we needed a mechanism that the employees would still be guaranteed payment. And Gene Hill was supposed to have worked with the Department of Finance and possibly even the Governor's office – I'm not quite sure whether he did that or not – to make sure that this system would work and there would be no interference from any other agency.

Gene, at the time we called him, basically stated that he had no explanation, that he thought that everybody was in agreement that the revolving funds could be used.

Q. Okay. So before you called him, he had been informed about the communications from the controller's office to Mr. Stancell about the program?

A. Yes, prior to contacting the Department of Finance – well, let me back up a little bit.

When it became apparent to us that some banks were going to back out of this deal, our office became [p. 133] more and more uncomfortable with running afoul of the FLSA, and we contacted Gene with the idea that we needed to have a fall-back position in the event that the banks were not going to continue to accept these. And we – the suggestion was mine that we utilize the payroll revolving funds. The idea had been discussed in the Biggs case early on for making payments to the employee

in the absence of a state budget, so it was something that was kicked around before.

But again, utilizing the revolving fund has to have the approval of the Department of Finance. Department of Finance limits its use to very specific purposes. We wanted approval to use it for this purpose. We felt that if Gene Hill could explain to the Department of Finance again what the vulnerability was with the FLSA and subjecting them to potential damages, that he would be the best one to make the argument for us.

And he later called us back and told us that it was – it was okay, that Finance would allow use of this. We then initiated contact with the Department of Finance to ensure that everything was in place, and then, to our surprise, Finance cancelled the program.

Q. Now, in this conversation with Mr. Hill where you – where you wanted to explain the vulnerability of the registered warrants, as you saw it, once some banks started pulling out, can you tell me the approximate date of that conversation?

[p. 134] A. Well, the approximate date was whenever the Bank of America had announced they were no longer going to accept these things. There had been rumors circulating that the banks were going to pull out. Of course, everybody was hopeful that by the time they did that there would be a budget in place and there would not be a problem.

But it became apparent to us there was not going to be a budget in place and that the banks were going to pull out, and then the premise which we had basically

had some comfort level in was that if the banks were accepting them, readily cashing them, then there wasn't really a problem with the FLSA, that notion was starting to vaporize. And so what we did was we had a fall-back position that was designed and discussed with the attorney general.

Q. Okay. And so I think in your previous deposition, correct me if I'm wrong, you said there was direct word from the Bank of America right around the middle of July, about a week before the public announcement which was on July 23rd. So was it in that time period that you spoke to Mr. Hill?

A. Uh-hmm, yes.

Q. And how did you explain to Mr. Hill your perception of the vulnerability of the registered warrants under FLSA? What did you say to him?

A. Well, the conversation was to the effect – I don't recall the exact words, but it was to be the effect [p. 135] that we had to have cash equivalent under the FLSA, and that obviously if the banks were not accepting these things, it would be hard to characterize them as a cash equivalent under any circumstance. If you can't redeem them, what good are they.

We discussed this with Gene Hill. Gene Hill was very concerned about the fact that the banks were pulling out, and he agreed with us that something needed to be done, and that is when I ran the suggestion by him. He thought it was a good suggestion and he agreed to take it forward for us.

Q. When the program was discontinued by Department of Finance and you spoke to Gene Hill, you said that he told you he didn't have an explanation?

A. As to why Finance had – he –

Q. No, you go ahead.

A. I'm sorry. He did later call us back and tell us that Finance had some concerns that the – that the revolving fund accounts of each agency would be depleted and then they would have to operate without revolving funds, and we would have to replenish them with the registered warrant.

We do not maintain records which would indicate the balances of each agency general fund – revolving fund, so we would not know how much money they had available to them at the time, and we would not know whether or not they had actually depleted it on the basis of their payroll.

[p. 136] Q. Well, did you discuss with him at that time that the revolving funds, if in fact they were being depleted, could be replenished by submitting the registered warrants to some bank for cashing?

A. Yes, we did.

Q. And what did he say to that, if anything?

A. Basically that it wasn't his call, that he would talk to the Department of Finance about it. But we did not know and we were not privy to the conversation that they had with Finance or whoever he spoke to concerning this problem.

Q. Did you communicate with Marsha Bedwell, who I believe you identified as Chief Counsel, Department of Finance, on the issue of revolving funds?

A. I did not.

Q. Do you know if anyone from the controller's office did?

A. I know that we did not, because, as I stated, Gene Hill was going to be our liaison between the two offices, and we figured they were more inclined to listen to their attorneys' advice as opposed to the controller's advice.

Q. Now, we skipped forward in time to the period of the revolving funds, and I want to go back now and refer you to page 27 of your deposition.

A. Did you want to do that before we talked about Exhibit 22?

Q. Oh, I thought there were only 20. Let's go on [p. 137] to 22. I lost count.

A. Exhibit 22 is a memo from Financial Management Division of the Department of Finance to all accounting officers, superintendents and business managers, which we got a copy of it around July 30, 1992.

This memo from Finance seems to make it clear, contrary to our understanding, that the exchange program was to be considered a one-time procedure which would apply to the July master payroll only.

And then there's a – a paragraph in here that NCYC – I have no idea who that is – "The accounting staff at

NCYC contacted all the local banks and asked if they would be redeeming Registered Payroll Warrants," and the recommendation that the banks follow the procedures of NCYC, whoever that may have been.

Q. Okay. Now, I want to clarify, this is from the Department of Finance?

A. Yes.

Q. To its internal division?

A. No, I believe they sent that to all agencies.

Q. Okay. In terms of the thing that you've already noted, that is the statement at the end of the first paragraph that the exchange program is to be considered a one-time procedure which will apply to July master payroll only, in your discussions with Mr. Hill and Mr. Stancell had a time limit on the program been raised?

A. No, and that's the first time we ever saw the [p. 138] time limit. It was our intent to make it available as long as necessary.

Q. Okay. Now, it also states here in the second paragraph that "They," the SCO, "are not 'requiring' that we comply . . . " with the exchange program.

Was that your understanding?

A. I think it was our understanding that we could not require anybody to use their revolving funds in this matter; that we needed the Department of Finance to issue some instructions to them as to how this would work.

We would have no authority to require that it would be done. It was our intent that they do it, and it was our understanding with Gene Hill that he would do whatever he could to get the Department of Finance to make the revolving funds available to everybody.

Q. Okay. And do you know who Tim Sutherland is?

A. No, I don't.

Q. Now, at the top of this undated memo it reflects that it was sent by the Division of Accounting on July 30, 1992.

A. Right.

Q. Did you see it soon after that date?

A. I saw it on that date. It came from Carla Lenerd in our accounting office.

Q. Was it this that motivated you to make a follow-up call to Mr. Hill?

A. Yes, because we were very concerned that this

* * *